No. 93-438

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

Supreme Court, U.S.
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NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; REASON F. WAREHIME, an individual; DORIS J. WILSON, an individual; and KATHRYN L. HINKLE, an individual, on behalf of themselves and all others similarly situated,

Petitioners,

v.

JESSE BROWN, Secretary for Veterans Affairs; THE DEPARTMENT OF VETERANS AFFAIRS; THE UNITED STATES OF AMERICA; and JANET RENO, Attorney General of the United States,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Page

National Ass'n of Radiation Survivors v. Derwinski, reh'g en banc denied, 994 F.2d 583 (9th Cir. 1993) a-1

National Ass'n of Radiation Survivors v. Walters, 473 U.S. 305 (1985) a-24

National Ass'n of Radiation Survivors v. Walters, 111 F.R.D. 595 (N.D. Cal 1986) a-90

National Ass'n of Radiation Survivors v. Derwinski, 782 F. Supp. 1392 (N.D. Cal 1992) a-110

Order re: Denial of Plaintiff-Appellees' Motion for Stay Pending Writ of Certiorari, United States Courts of Appeal, Ninth Circuit, June 18, 1993 ..... a-148

Challenged Constitutional provisions and statutes a-150

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, et al., Plaintiffs-Appellees,

v.

Edward J. DERWINSKI, Secretary of the Department of Veterans Affairs, et al., Defendants-Appellants.

No. 92-15988.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Sept. 15, 1992.

Decided Nov. 24, 1992.

As Amended on Denial of Rehearing;

Suggestions for Rehearing En Banc

Rejected June 18, 1993.

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Gordon P. Erspamer, Morrison & Foerster, and Matthew I. Larrabee, Heller, Ehrman, White & McAuliffe, San Francisco, CA, for plaintiffs/appellees.

Appeal from the United States District Court for the Northern District of California.

Before: CHOY, ALARCON and HALL, Circuit Judges.

CHOY, Circuit Judge:

A class of individuals with claims for Veterans' Administration ("VA") benefits based on exposure to ionizing radiation during service ("IR claimants/plaintiffs") challenges the constitutionality of a statute that limits to $10 the amount a

claimant can pay an attorney representing him in pursuit of VA benefits. The United States District Court for the Northern District of California held that this fee limitation violates the IR claimants' procedural due process rights as well as their First Amendment right to free speech and to petition the government. We reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1983, plaintiffs—two veterans' organizations and four individuals—brought an action challenging the constitutionality of 38 U.S.C. §§ 3404 and 3405 (now codified as amended at 38 U.S.C. §§ 5904 and 5905), which limit the fee a veteran or his survivor may pay an attorney to assist him in prosecuting a claim before the VA to $10. The district court granted a nationwide preliminary injunction prohibiting the enforcement of the fee, *National Ass'n of Radiation Survivors v. Walters*, 589 F.Supp. 1302 (N.D.Cal.1984). The government appealed directly to the Supreme Court, and the Court reversed, holding that the fee limit was not unconstitutional on its face. *Walters* v. National Ass'n of Radiation Survivors, 473 U.S. 305, 105 S.Ct 3180, 87 L.Ed.2d 220 (1985).[1] The Court left open the possibility of a constitutional attack on the fee limit as applied to particular classes of veterans. *See id.* at 337, 105 S.Ct. at 3198 (O'Connor, J., concurring) ("the Court, in reversing the lower court's preliminary injunction, does not determine the merits of the appellees' individual 'as applied' claims").

On remand, plaintiffs amended their complaint to assert that the fee limit was unconstitutional as applied to individuals with claims based on exposure to ionizing radiation. The district court certified the class of IR claimants. *National Ass'n*

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1 At the time direct appeal to the Supreme Court was proper under 28 U.S.C. § 1252. Congress has since amended the statute to make appeal to this court the appropriate recourse. *See* Pub.L. No. 100-352 § 1, 102 Stat. 662.

of Radiation Survivors v. Walters, 111 F.R.D. 595 (N.D.Cal.1986).[2] After extensive pretrial proceedings, the case went to trial.

During and after the trial Congress passed several pieces of legislation relevant to the plaintiffs' claims. Congress passed the Veterans' Judicial Review Act of 1988 ("JRA"), Pub.L. No. 100-687, 102 Stat. 4105 (1988). Prior to the enactment of the JRA a veteran could only appeal a benefits claim up to the Board of Veterans Appeals ("BVA"), an adjudicatory body within the VA. The JRA created the United States Court of Veterans Appeals ("CVA") to review decisions of the BVA. JRA §§ 4051, 4052(a), 102 Stat at 4113. It also provided for judicial review of CVA decisions by the Court of Appeals for the Federal Circuit. *Id.* § 4092, 102 Stat. at 4120. In addition, the JRA amended the fee limitation by providing that a claimant may pay an attorney for services rendered after the BVA makes an initial decision about his claim. *Id.* § 104(a), 102 Stat. at 4108. This scheme allows the claimant to obtain a lawyer for appeals to the CVA and the Federal Circuit, or to conduct further administrative proceedings within the VA by reopening a claim.[3] *Id.* However, the amendment easing the fee limitation only ap-

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2 The class was defined as follows:

> All persons who currently have pending or who file or re-open VA service-connected death and disability compensation I ("SCDD") claims based on exposure to nuclear radiation from government atomic bomb tests in the Marshall Islands or the Nevada Test Site or from the atomic bombs dropped on Hiroshima and Nagasaki in 1945 ("ionizing Radiation Claims"). The class also includes all persons who are receiving or receive SCDD for an Ionizing Radiation Claim but: (1) whose compensation has been reduced or is threatened with reduction, or (2) who have formally contested, or formally contest, the disability rating issued by the VA or the period of retroactive compensation.

National Ass'n of Radiation Survivors v. Walters, 111 F.R.D. 595, 597-98 (N.D.Cal. 1986).

3 A claim can be reopened for further proceedings before the VA if there is new material evidence that was not considered in the earlier adjudication of the claim. JRA § 3008, 102 Stat. at 4107.

plies to claimants who have filed a Notice of Disagreement on or after November 18, 1988.[4] *Id.* § 403, 102 Stat. at 4122. The JRA may moot the complaints of some IR claimants but it does not affect those who filed Notices of Disagreement before the effective date of the JRA.

Congress also passed the Radiation-Exposed Veterans Compensation Act of 1988, Pub.L. No. 100-321, 102 Stat. 485 (1988). This act creates a presumption that certain diseases, which manifest to a degree of ten percent within specified latency periods, are service-connected. If the veteran contracts a disease not listed in the statute or it remains latent beyond the specified periods, no presumption exists. This Act, therefore, does not affect the claims of all of the class plaintiffs. Moreover, those that it does affect are still subject to the fee limit.

Finally, Congress passed the Radiation Exposure Compensation Act, Pub.L. No. 101-426, 104 Stat. 920 (1990). This act provides for one-time payments of $50,000 to individuals who participated onsite in a test involving the atmospheric detonation of a nuclear device, developed a disease specified in the statute, and meet certain other criteria. The payment will be decreased by the amount of "any payment made pursuant to a final award of settlement on a claim" based on injuries resulting from exposure to radiation. Pub.L. No. 101-426, § 6(c)(2). The district court found that veterans' benefits may result in an offset of the lump sum payment. *National Ass'n of Radiation Survivors v. Derwinski*, 782 F.Supp. 1392, 1394 n. 1 (N.D.Cal.1992).

Because none of these statutes moot the claims of all of the class members, the district court found it necessary to pass on the constitutionality of the scheme as it applied to the remaining plaintiffs. The district court found that the fee limit, as applied to the class of IR claimants, was an unconstitutional de-

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4 When a veteran initially files a claim it goes before a ratings board at a regional VA office. If the ratings board denies the claim, the claimant can appeal that decision by filing a Notice of Disagreement.

privation under the Due Process Clause of the Fifth Amendment and the First Amendment's guarantee of the right to free speech and the right to petition the government for redress of grievances. *Derwinski*, 782 F.Supp. at 1412. The government appeals this ruling.

A main point of contention in this case is the alleged difficulty of pursuing an IR claim for benefits within the VA. In describing the procedure for processing service-connected disability or death ("SCDD") claims, the Supreme Court in *Walters* noted that "[t]he process is designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters*, 473 U.S. at 311, 105 S.Ct. at 3184. A number of general regulations govern the procedure for examining SCDD claims.

A veteran applies for benefits by submitting a claim form to the local veterans agency. A three-person "ratings board" of the VA regional office reviews the claim application. A claimant is "entitled to a hearing at any time on any issue involved in a claim ..." 38 C.F.R. § 3.103(c) (1991). These proceedings are ex parte. *Id.* § 3.103(a). The ratings board determines the extent of the veteran's disability and whether such disability is service-connected. The board is required to "assist a claimant in developing the facts pertinent to [his] claim," *id.*, and to consider any evidence offered by the claimant. *Id.* § 3.103(d). Moreover, the board is required to resolve all reasonable doubts in favor of the claimant. *Id.* § 3.102.

After reviewing the evidence, the rating board either denies the claim or assigns a disability rating upon which benefits are calculated. The board notifies the claimant of its decision, and the claimant may appeal the board's decision by filing a Notice of Disagreement with the local agency. If the local agency stands by its original decision, it issues a "Statement of the Case" that describes the facts and applicable law upon which its decision is based. The claimant may then appeal to the BVA. Before the amendments discussed above were enacted, the BVA's decisions were not subject to judicial review. *See Walters*, 473 U.S. at 311, 106 S.Ct. at 3184. Under the JRA, however, claimants who file a Notice of Disagreement on or

after November 18, 1988 can appeal BVA decisions to the CVA and then to the Court of Appeals for the Federal Circuit while claimants who filed a Notice of Disagreement before November 18, 1988 do not have that option.

In addition to the general regulations, the VA has adopted regulations specifically dealing with IR claims pursuant to a mandate from Congress in the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub.L. No. 98-542, 98 Stat. 2725 (1984). Section 3.311b of Title 38 of the Code of Federal Regulations sets forth three requirements an IR claimant must meet in order to have the VA investigate his claim: (1) the veteran must have been exposed to ionizing radiation due to participation in the atmospheric testing of nuclear weapons, the occupation of Hiroshima or Nagasaki from September 1945 until July 1946, or other activities as claimed; (2) the veteran must have subsequently developed one of seventeen delineated diseases; and, (3) the veteran must have developed the disease within a specified period of time.

If an IR claimant meets the criteria of § 3.311b, the VA will investigate the claim by gathering factual information and requesting an estimate from the Defense Nuclear Agency ("DNA") of the radiation dose the veteran was exposed to during service.[5] If any of the three requirements are not met the VA determines that the alleged disease did not result from ionizing radiation.

Various national veterans' organizations make available trained service representatives to assist claimants in developing and presenting their claims before the VA. These service representatives provide assistance free of charge, and any claimant who requests a representative will receive assistance.

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5 A claimant may submit a separate radiation dose estimate from a "credible source." If the claimant's estimate is at least double the estimate prepared from the official military record, the matter is referred to an independent expert for the preparation of a separate dose estimate. *Id.* § 3.31 1 b(a)(3).

II. STANDARD OF REVIEW

The district court made a number of factual findings concerning the nature of IR claims. We review these factual findings for clear error. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir.1985). The district court's conclusions regarding the due process and First Amendment claims present mixed questions of law and fact since they involve a determination of whether factual findings satisfy undisputed rules of law. *United States v. McConney*, 728 F.2d 1195, 1200, 1205 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). Normally, mixed questions of law and fact are reviewed *de novo* because they require the consideration of legal concepts. *Id.* at 1202. Because this is particularly true in a case involving constitutional rights, *id.* at 1203, we review the district court's conclusions regarding the due process and First Amendment claims *de novo*.[6]

III. DISCUSSION

A. Due Process Claim

Our evaluation of the due process claim is controlled by *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct 893, 47 L.Ed.2d 18

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6 Mixed questions of law and fact can be reviewed under the clearly erroneous standard if the concerns of judicial administration in a particular case favor a district court determination of whether the facts satisfy the legal standard. *Id.* at 1202. Plaintiffs assert that the clearly erroneous standard should be applied to the district court's due process and First Amendment findings due to the size and complexity of the record in this case and the fact-intensive nature of the district court's ruling. Although the size and complexity of the record support applying a deferential standard to the district court's factual findings, precedent establishes that the *de novo* standard of review is appropriate for mixed questions involving constitutional issues. *Id.* at 1203 ("The predominance of factors favoring *de novo* review is even more striking when the mixed question implicates constitutional rights."); *United States v. Spokane*, 918 F.2d 84, 86 (9th Cir. 1990) *cert. denied*, __ U.S. __, 111 S.Ct. 2888, 115 L.Ed.2d 1053 (1991); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 n. 1 (9th Cir. 1990) (mixed question of fact and law involving First Amendment free speech rights is subject to *de novo* review).

(1976). Under *Mathews*, we must balance the government's interest in enforcing the fee limitation; the private interest affected by the limitation; the risk of an erroneous deprivation of IR benefits under the present VA system; and the probability that allowing veterans to retain counsel would avoid erroneous deprivations of IR benefits. *Id.* at 335, 96 S.Ct. at 903.

The district court applied the *Mathews* test and concluded that the government has no significant interest in retaining the fee limit, that the private interest in IR claims is great, that there is currently a high risk of erroneous deprivation of IR claims, and that the assistance of attorneys would sharply reduce the potential for error.[7] We find that the district court erred in its assessment of each of these factors.

(1) The Government's Interest in the Fee Limit

The Supreme Court in *Walters* described the governments interest in the fee limit as follows: "the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer." *Walters*, 473 U.S. at 321, 105 S.Ct. at 3189. The Supreme Court in *Walters* accorded this government interest "great weight." *Id.* at 326, 105 S.Ct. at 3192.

On remand, the district court found that Congress had rejected this asserted interest when it passed the JRA by allowing veterans to pay attorneys' fees when pursuing claims after

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[7] As a preliminary criterion for finding a procedural due process violation, the district court correctly concluded that both applicants for and recipients of SCDD benefits possess a constitutionally protected property interest in those benefits. *Derwinski*, 782 F.Supp. at 1395; *see Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (recipients of social security benefits have a constitutionally protected property interest); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990) (applicant for social security benefits has a property interest in those benefits); *Ressler v. Pierce*, 692 F.2d 1212, 1214-16 (9th Cir.1982) (applicants for federal rent subsidies have a constitutionally protected property interest).

the initial BVA decision. *Derwinski*, 782 F.Supp. at 1408-09.[8] The government asserts that, far from rejecting that interest, in passing the JRA Congress reaffirmed the government's interest in the fee limitation because it retained the fee limit for administrative proceedings within the VA system up to the initial decision issued by the BVA.[9] We agree with this contention and find that the district court misinterpreted the significance of the passage of the JRA in relation to the government's interest in the fee limit.

The legislative history of the JRA strongly supports this conclusion. The Committee Report on the Senate version of the bill, which Congress eventually passed after incorporating several portions of the House bill, stated that attorneys were unnecessary during initial administrative proceedings:

> [T]here would seem to be no need for the assistance of an attorney in order to initiate the claims process by completing and filing an application. Moreover, even if the initial decision is adverse, the Committee believes that it may be unnecessary for a claimant to incur the

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[8] The district court also found that the government's interest was weakened by recently issued VA regulations which provide that an attorney "may receive a fee or salary in excess of the statutory limit from an organization, governmental entity, or other disinterested third party for representation of a claimant." 38 C.F.R. § 14.634(a). The district court stated that it could not "conceive of any rational government interest which would be served by effectively preventing individual claimants from retaining the assistance of counsel for adjudication of their VA claims when non-profit organizations may retain these same attorneys for the same purpose." *Derwinski*, 782 F.Supp. at 1409.

However, as the government points out, its interest in preventing veterans from having to divide their benefits awards with lawyers is unaffected by the recent VA regulations. Allowing a third party to pay an attorney to represent the veteran does not compromise the veteran's benefits award.

[9] Even where the fee limit is inapplicable, the attorney must submit his or her fee agreement to the BVA for review. JRA, § 104(a), 102 Stat. at 4108. The BVA may reduce the fee if it is "excessive or unreasonable." *Id.*

> substantial expenses for attorney representation that may not be involved in appealing the case for the first time to the BVA. The claimant may well prevail, as many claimants currently do, without legal representation when the case is first before the BVA.

S.Rep. No. 418, 100th Cong., 2d Sess. at 63-64 (1988), U.S. Code Cong. & Admin. News p. 5782.

The Committee also reported that the bill was intended to maintain the system of service representatives. "[T]he Committee is concerned that any changes relating to attorneys' fees be made carefully so as not to induce unnecessary retention of attorneys by VA claimants and not to disrupt unnecessarily the very effective network of nonattorney resources that has evolved in the absence of significant attorney involvement in VA claims matters." *Id.* at 63.[10]

Furthermore, a similar argument to the district court's was considered and rejected by the Supreme Court in *Walters*. In his *Walters* dissent Justice Stevens made an argument similar to the district court's based on a proposed bill that provided for limited judicial review of BVA decisions and eased the attorney fee limit. *Walters*, 473 U.S. at 365-66, 105 S.Ct. at 3212-13 (Stevens, J., dissenting). In rejecting Justice Stevens' reasoning, the Court emphasized the fact that the proposed bill retained the fee limit for administrative proceedings up to the initial BVA decision. *Walters*, 473 U.S. at 322 & n. 10, 105 S.Ct. at 3190 n. 10.

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[10] Plaintiffs assert that when the fee limitation initially was enacted it was intended to prevent unscrupulous attorneys from charging unjustified fees for completing simple forms. The Senate Report for the JRA does explicitly state that concern over unscrupulous attorneys is no longer warranted. *Id.* at 64. Plaintiffs argue that the government should not be allowed to assert a different purpose for the fee limitation than the original purpose. We find this argument without merit. Although when initially enacted the fee limit may have been motivated by a desire to protect claimants from unscrupulous attorneys, the Senate Committee Report for the JRA indicates that Congress now endorses other purposes for maintaining a fee limit through the initial BVA decision and we see no reason why the government is precluded from asserting these other purposes.

We find that the passage of the JRA did not undermine the government's interest in the fee limit. The retention of the fee limit through the initial BVA decision and the legislative history of the JRA indicate that Congress continues to believe that the government has a strong interest in minimizing attorney participation in benefits proceedings before the VA.

The district court also concluded that enabling claimants to retain counsel would not increase the cost of administration of IR claims. This contradicts the Supreme Court's finding in *Walters* that the introduction of lawyers into administrative proceedings is likely to have serious adverse consequences:

> A necessary concomitant of Congress' desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible. ... The regular introduction of lawyers into the proceedings would be quite unlikely to further this goal. ...
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> ...
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> ... It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. ... And this additional complexity will undoubtedly engender greater administrative costs, with the end result being that less Government money reaches its intended beneficiaries.

Id. at 323-24, 326, 105 S.Ct. at 3190-91, 3192; *see also Wolff v. McDonnell*, 418 U.S. 539, 570, 94 S.Ct. 2963, 2981, 41 L.Ed.2d 935 (1974) (use of counsel in prison disciplinary proceedings would "inevitably give the proceedings a more adversary cast"); *Gagnon v. Scarpelli*, 411 U.S. 778, 787, 93 S.Ct. 1756, 1762, 36 L.Ed.2d 656 (1973) ("introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding").

The district court's dismissal of the potentially detrimental effects of increasing the number of lawyers appearing before the VA severely discounts the Supreme Court's finding in *Walters*. On the basis of the legislative history of the JRA and the Supreme Court's statements in *Walters*, we find the district court's conclusion that the government has no significant interest in retaining the fee limit flawed. The passage of the JRA serves to reaffirm the government's strong interest in retaining the fee limit. The Supreme Court's assessment of the government's interest in the fee limit in *Walters* remains valid.

(2) Private Interest

The district court found that a "substantial majority of IR claimants would rely primarily on SCDD benefits for their basic maintenance and support." *Derwinski*, 782 F.Supp. at 1396. This factual finding supported the district court's conclusion that the private interest at stake in IR claims is "great." *Id.* at 1407.

The government argues that since IR benefits are not need-based the district court should not have concluded that the private interest in IR claims is strong. This argument is supported by the holding in *Walters*, in which the Supreme Court found the fact that VA benefits are not need-based "determinative of the right to employ counsel." 473 U.S. at 333, 105 S.Ct. at 3195.[11] While the government concedes in its Reply Brief that non-need based benefits can be subject to due process, it takes the position that the district court's findings regarding the poverty of IR claimants and their dependence on VA benefits are irrelevant in assessing whether the process used to determine IR claims comports with the Constitution. While the poverty of the IR claimants is not necessarily irrelevant in assessing their private interest, we agree with the government that non-need based benefits do not create as strong

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[11] In reaching this conclusion the Supreme Court distinguished VA benefits from welfare benefits. *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)).

an interest as need-based benefits. *Mathews*, 424 U.S. at 342-43, 96 S.Ct. at 906.

The government also argues that the class of IR claimants in this case consists of applicants for benefits rather than recipients, and that this fact weakens their interest in challenging the fee limit. The veterans respond that their plaintiff class contains both applicants and recipients and therefore the government's argument must fail. The definition of the certified class does include recipients. *See supra* note 2. However, the government states that because the VA concedes that the JRA would apply to current recipients of benefits, all recipients are removed from the class, leaving only applicants.[12] Ultimately, whether the class now includes any recipients remains unclear. To the extent that the class includes applicants, we do agree with the government's contention that applicants have weaker interests in government benefits than recipients. *See Ressler v. Pierce*, 692 F.2d 1212, 1217 (9th Cir.1982) (applicants for HUD rent subsidiaries are entitled to due process protection in application and selection process).

Even though the remaining class might include some recipients, the fact that IR benefits are not need-based compels us to find that the district court erred in characterizing the private interest of IR claimants as "great". Accordingly, we reduce the weight accorded the IR claimants' private interest in evaluating the due process claim.

(3) Risk of Erroneous Deprivation of Benefits

The final factors under *Mathews* are the "risk of an erroneous deprivation of [the claimant's] interest" and the

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12 In its Reply Brief the government states that the VA concedes that the JRA would apply to any attempt to reduce recipients' IR benefits. It is not entirely clear whether this would truly remove all recipients from the class. That concession does not appear to exempt recipients falling into the second part of the class definition, those contesting the disability rating or period of retroactive compensation. The VA is not attempting to reduce the benefits of those recipients, rather the recipients are attempting to increase their benefits by challenging VA decisions.

"probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903; *see Walters*, 473 U.S. at 321, 105 S.Ct. at 3189. The Supreme Court in *Walters* explained that due process law accords legislatures considerable flexibility in devising processes for dispute resolution. *Id.* at 326, 105 S.Ct. at 3192. Therefore, the Court held, "[i]t would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law." *Id.*

On the bases of a number of factual findings, the district court concluded that the VA's system for handling IR claims created a substantial risk that claimants erroneously will be deprived of benefits. *Derwinski*, 782 F.Supp. at 1396-1402. It also found that the VA's procedural safeguards are inadequate to decrease the risk of error and that lawyers are necessary to minimize the errors. *Id.* at 1402-07. Considering all the evidence, the district court concluded that plaintiffs "made an extraordinarily strong showing of the probability of erroneous denial of ionizing radiation claims under the existing system, and an equally strong showing that assistance of counsel will sharply reduce that possibility." *Id.* at 1409.

The government argues that the district court made several errors in reaching these conclusions. First, the government argues that the district court improperly substituted its judgment for the informed decisions of Congress. *See Mathews*, 424 U.S. at 349, 96 S.Ct. at 909 ("substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals"); *Walters*, 473 U.S. at 334, 105 S.Ct. at 3196. The government argues that the district court's holding requires the VA to adopt an adversarial mode of decision-making rather than the informal system now in place. We find that, with regard to certain of the district court's factual findings discussed more fully below, insufficient deference was given to Congressional findings.

Additionally, the government argues that the district court erred in assessing the type of evidence necessary to determine that the IR claims process fails to meet due process requirements. The government asserts that the district court wrongly focused on whether the VA process is too complex and that the district court should have looked at two other factors. First, the government urges that the proper inquiry is whether lawyers are necessary to make the process fair, not whether lawyers are better able to pursue claims than non-lawyers. *See Walters*, 473 U.S. at 331, 105 S.Ct. at 3194. Second, the court should have focused on whether the IR claims process has produced or is substantially likely to produce a significant number of wrongful denials of claims as opposed to focusing on the complexity of the process. *Id.* at 330, 105 S.Ct. at 3194 ("a process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them"). The government correctly articulated the standards set forth in *Walters*. We find that the district court failed to adhere to those standards.[13]

(a) Findings Regarding the Complexity of IR Claims

The district court found that several level of complexity in the VA system for handling IR claims made it suspect under the Due Process Clause. The court divided its analysis into three parts: (1) the complexity in the governing law and procedure; (2) the complexity of the medical and scientific issues raised by IR claims; and, (3) the development of complex factual issues supporting IR claims.

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[13] The government also contends that the district court erred by failing to consider the VA's evidence that its informal process of handling IR claims comports with due process. This argument lacks merit. The fact that the district court did not discuss portions of the evidence presented neither indicates that the district court ignored that evidence, nor provides a basis for disregarding the district court's factual findings. *Truck Terminals, Inc. v. Commissioner*, 314 F.2d 449, 454-55 (9th Cir.1963). The district court was presented with a large amount of conflicting evidence and we will not reverse its resolution of those conflicts unless it is clearly erroneous. *Mayview Corp. v. Rodstein*, 620 F.2d 1347, 1353 (9th Cir. 1980).

The district court found that the complexity of the governing law and procedure makes it difficult for a layperson to file and process an IR claim. The government argues that claimants do not need to be able to use these materials to file a claim because the VA does the work for them; the system is designed so that veterans can file and process claims without the help of an attorney.

Our review of the legislative history of the JRA confirms that the system comports with the government's view of the VA claims process:

> [The existing limit on attorneys' fees is generally appropriate with respect to the initial claims stage in the sense that applying for VA benefits is a relatively uncomplicated procedure, with the VA generally securing the relevant military records as well as evaluating the merits of the claim. ... there would seem to be no need for the assistance of an attorney in order to initiate the claims process by completing and filing an application.

S.Rep. No. 418, 100th Cong., 2d Sess. at 63 (1988); *see also* H.Rep. No. 963, 100th Cong., 2d Sess. at 13-14, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795. Congress is a body particularly well suited to engage in factual analysis of issues involving large quantities of information and its determination regarding the manner in which the VA benefits system operates is entitled to great deference. *Walters*, 473 U.S. at 331 n. 12, 105 S.Ct. at 3194 n. 12.

Notably, the district court did not conclude that significant numbers of IR claimants have been denied benefits because they were unable to follow the procedures necessary to pursue their claims. Rather, its finding that the governing law and procedure involved in the IR claims process is complex is based solely on a description of the process for assessing those claims in the abstract. In *Walters*, the Supreme Court specifically rejected the district court's finding at the preliminary injunction stage that the SCDD benefits process was complex because that finding was based on a discussion of that process in the abstract. *Walters*, 473 U.S. at 329, 105 S.Ct. at 3193. The

Supreme Court's reasoning in *Walters* indicates that the district court's finding regarding the complexity of the law and procedures of IR claims is not sufficient to establish a due process violation.

The district court also found that IR claims present much more complex medical and scientific issues than other SCDD claims. *Derwinski*, 782 F.Supp. at 1398-1402. Based on these findings the district court determined that to properly present an IR claim expert medical opinion and testimony as well as scientific evidence must be marshalled. *Id.* at 1402.

The government asserts that, although the district court found that IR claims are complex, it did not find that a significant number of IR claimants wrongfully were denied benefits due to the medical and scientific complexities of IR claims. The government suggests that such a finding is necessary to determine that the VA system is not working because without this evidence IR cases are not materially different from all SCDD claims controlled by *Walters*.[14]

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[14] In response to the district court's findings on the complexity of determining disease causation and of accurately assessing radiation dose estimates the government further contends that the district court failed to give adequate deference to Congress' determination that these issues should not be resolved on a case-by-case basis.

The government's argument is unpersuasive. The Veterans' Dioxin and Radiation Exposure Compensation Standards Act of 1984, Pub.L. No. 98-542, 98 Stat. 2725 (1984), conferred considerable discretion on the VA in establishing the proper guidelines for assessing IR claims. The VA regulations adopted pursuant to Pub.L. No. 98-542 provide for individualized assessments of IR claims. See 38 C.F.R. § 3.31 lb(c)-(e). The government's contention that the current benefits system eliminates case-by-case determinations of causation is incorrect.

Similarly, the current benefits system already allows for individualized consideration of radiation dose estimates. Both Pub.L. No. 98-542 and the regulation adopted pursuant to that law, 38 C.F.R. § 3.311b, allow IR claimants to submit their own radiation dose estimates. Pub.L. No. 98-542, § 7(b), 98 Stat. at 2731; 38 C.F.R. § 3.311b(a)(3).

We agree with the government's analysis. The district court's factual findings indicate that IR claims present considerable medical and scientific complexities; such complexities present the risk of errors in the assessment of IR claims and that risk may be reduced by marshalling medical and scientific evidence. However, on the basis of the district court opinion we cannot assess how frequently such errors actually occur in the present VA system. *Walters*, 473 U.S. at 327, 105 S.Ct. at 3192 (discussing the inability to determine based on the record the quantity of erroneous deprivations of VA benefits).

The district court's findings regarding the complexity of factual development in IR cases present the same problem as the district court's other findings regarding the complexity of IR claims.[15] It ultimately is unclear from its opinion how frequently IR claims wrongly are denied due to inadequate factual development.

We find that the district court's abstract discussion of the complexities involved in IR claims does not provide a sufficient basis for determining that the probability of error under the present system for adjudicating IR claims is truly "extraordinarily strong."

(b) Findings Regarding Procedural Safeguards

The district court also found that procedural safeguards within the VA system, designed to protect the rights of SCDD and IR claimants, do not achieve that goal. *Derwinski*, 782 F.Supp. at 1403-05. It concluded that the VA system actually functions in an adversarial manner and that service representatives are overworked and unable to adequately represent IR

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15 The district court found that properly developing the underlying facts in IR claims is a very intricate process and that much of the relevant information is difficult to obtain. *Derwinski*, 782 F.Supp. at 1402.

claimants. *Id.* at 14030-06.[16] Once again, the district court ignored Congressional findings establishing the opposite contention. Recent Congressional reports state that the VA benefits system does function in a nonadversarial manner and that the service representatives effectively represent VA claimants.

The House Report prepared in conjunction with the JRA notes that "[o]ne of the most valuable features of the present VA system is the participation of unpaid veteran service organization representatives in every aspect of the VA benefits system." H.Rep. No. 963, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5807; *see also* S.Rep. No. 418, 100th Cong., 2d Sess. at 64 (1988) ("[There is a strong and vital system of veterans service officers who provide excellent representation at no cost to claimants."); *Walters*, 473 U.S. at 322, 105 S.Ct. at 3190. In addition, the House Report indicates that the VA system functions in a non-adversarial manner. H.Rep. No. 963, reprinted in 1988 U.S.C.C.A.N. 5782, 5811 ("the VA is expressly encourage[d] to preserve its informal, non-adversarial procedures").

These Congressional findings are deserving of our great deference. "When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters*, 473 U.S. at 331 n. 12, 105 S.Ct. at 3194 n. 12; *see also Rostker v. Goldberg*, 453 U.S. 57, 72-73, 101 S.Ct. 2646, 2656, 69 L.Ed.2d 478 (1981). The district court was not free to ignore these Congressional findings on the adequacy of VA procedures when evaluating the due process claim.

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[16] The district court also found that the VA has erroneously applied 38 C.F.R. § 3.309 dealing with presumptive service connection, resulting in wrongful denial of claims. *Id.* at 1403. Unfortunately, the district court did not quantify the frequency of such errors, making it difficult to assess how much weight such errors should be given in the due process analysis. *See Walters*, 473 U.S. at 320, 105 S.Ct. at 3189 ("the [Due Process] Clause does not require that 'the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error.'" (quoting *Mackey v. Montrym*, 443 U.S. 1, 13, 99 S.Ct. 2612, 2618, 61 L.Ed.2d 321 (1979)).

(4) Probable Value of Attorneys in Reducing The Risk of Error

The Supreme Court in *Walters* stated that "it is less than crystal clear why lawyers must be available to identify possible errors in medical judgment." *Walters*, 473 U.S. at 330, 105 S.Ct. at 3194.[17] The district court found that IR claims present many tasks for which attorneys particularly are well suited. Attorneys could secure government documents with relevant information, help claimants avoid procedural errors, enhance the effective use of medical and scientific experts, conduct detailed factual development, and prepare briefs. *Derwinski*, 782 F.Supp. at 1406. The government concedes that attorneys could assist with a number of tasks but asserts that this does not indicate that lawyers are *necessary* to ensure procedural fairness in the adjudication of IR claims. *See Walters*, 473 U.S. at 331, 105 S.Ct. at 3194.

In support of its finding, the district court stated that "evidence demonstrates that IR claimants who employ attorneys have had significantly higher success rates than those relying on service representatives." *Derwinski*, 782 F.Supp. at 1407. The evidence referenced in that quote showed that in IR claims handled by lawyers the claims were granted in 5 out of 31 cases (16%) while in IR claims not handled by lawyers the claims were granted in 35 out of 5,456 cases (.6%).

This is a greater disparity than the 2% difference between general SCDD claims adjudicated with and without attorneys which the Supreme Court found inadequate to show a due process violation in *Walters*. However, the difficulty with according great weight to the results reached in 5 cases is the absence of evidence on the relative strength of the claims in those cases as compared to other IR claims.

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17 *See also Washington v. Harper*, 494 U.S. 210, 236, 110 S.Ct. 1028, 1044, 108 L.Ed.2d 178 (1990) (quoting *Walters*, 473 U.S. at 330, 105, S.Ct. at 3194) (holding that due process does not require the presence of counsel in civil proceedings to authorize medical treatment of mentally ill prisoners).

Given our findings as to the governmental and private interests at stake in this case, and given that the issue is whether the presence of attorneys would "sharply diminish" the probability of error in the adjudication of IR claims, we conclude that the evidence presented does not satisfy the extraordinarily strong showing standard set forth in *Walters*, and we find no due process violation.

B. First Amendment Claim

The district court also held that the fee limitation violates the IR claimants' First Amendment right to free speech and to petition the government. *Derwinski*, 782 F.Supp. at 1412. The claim that the fee limit raises First Amendment issues is based on a series of Supreme Court opinions holding that collective activity taken to achieve meaningful access to the courts is protected by the First Amendment. *See United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971).

In *Walters* the Supreme Court noted that there were "numerous conceptual difficulties" with extending those cases to the situation involving VA claimants. *Walters*, 473 U.S. at 334, 105 S.Ct. at 3196. Since the above cases all involved organizations helping their members secure legal representation, the Court found "the First Amendment interest at stake [in those cases] was primarily the right to associate collectively for the common good." *Id.* at 335, 105 S.Ct at 3196. In contrast, the Court found the First Amendment interest in this case to be an individual interest in best pursuing a claim. *Id.*

Despite the fact that those First Amendment cases dealt with collective activity, both the district court and plaintiffs assert that they are applicable to the situation involving IR claimants and cite a number of decisions that have interpreted those Supreme Court cases as applying to individuals as well as to organizations. *See, e.g., Rizzo v. Dawson*, 778 F.2d 527, 531

(9th. Cir.1985) (plaintiff's claim that prison transfer was retaliation for his work assisting other prisoners as a "jailhouse lawyer" and for pursuing his own legal action was sufficient to state a First Amendment claim); *Hadix v. Johnson*, 694 F.Supp. 259 (E.D.Mich.1988) (prison's library and the legal assistance available to prisoners were inadequate to provide prisoners meaningful access to courts), *aff'd without opinion*, 871 F.2d 1087 (6th Cir.1989); *Jackson v. Procunier*, 789 F.2d 307 (5th Cir.1986) (prison mailroom delays in delivering prisoner's legal papers may have interfered with his right of access to the courts).

It is unclear that such cases, which are factually distinct, would apply to a situation involving IR claimants who assert "a First Amendment right to pay their surrogate speaker" before an administrative agency. *Walters*, 473 U.S. at 335, 105 S.Ct. at 3196. The Supreme Court in *Walters* found the notion that VA claimants have a First Amendment right to pay a surrogate speaker a "questionable proposition." *Id.*

Although the First Amendment extends to the right to petition an administrative agency,[18] what constitutes "meaningful access" to an agency may not be the same as what constitutes "meaningful access" to a court. A number of opinions express the view that legal aid often is necessary to achieve meaningful access to the courts. *See, e.g., Maitin v. Lauer*, 686 F.2d 24, 32 (D.C.Cir.1982); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1108 (5th Cir.), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980). Whether the aid of an attorney is necessary for IR claimants to achieve "meaningful access" to the VA benefits process is the main point of contention in this case. Since the heart of the First Amendment inquiry is whether the IR claimants currently have "meaningful access" to the VA benefits process, we conclude that the focus of the First Amendment analysis is essentially the same as that under the Due Process Clause. *Walters*, 473 U.S. at 335, 105

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18 *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972).

S.Ct. at 3196 ("appellees' First Amendment arguments, at base, are really inseparable from their due process claims").

We have already determined in our due process analysis that attorneys are not necessary to afford IR claimants meaningful access to the VA benefits process. We likewise determine that the fee limit does not violate appellees' First Amendment rights.

REVERSED.

WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL. V. NATIONAL ASSOCIATION OF RADIATION SURVIVORS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. 84-571. ARGUED MARCH 27, 1985-DECIDED JUNE 28, 1985

Mark I. Levy argued the cause for appellants. With him on the briefs were *Solicitor General Lee, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller,* and *William Kanter.*

Gordon P. Erspamer argued the cause and filed a brief for appellees National Association of Radiation Survivors et al. *Robert L. Gnaizda* filed a brief for appellee American G.I. Forum.* *

JUSTICE REHNQUIST delivered the opinion of the Court.

Title 38 U.S.C. § 3404(c) limits to $10 the fee that may be paid an attorney or agent who represents a veteran seeking benefits for service-connected death or disability. The United

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* *Joseph C. Zengerle* filed a brief for Disabled American Veterans as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union Foundation et al. by *Burt Neuborne, Charles S. Sims, Alan L. Schlosser,* and *Amitai Schwartz;* for the American Veterans Committee, Inc., by *Michael W. Beasley, Allan L. Kamerow, Lawrence E. Lewy,* and *Irving R.M. Panzer;* for the Federal Bar Association by *Alfred F. Belcuore;* for the Lawyers' Club of San Francisco by *Jerome Sapiro Jr.,* and *Fred H. Altshuler;* for the National Association of Atomic Veterans by *Walter R. Allan, Karen J. Wegner,* and *Debra B. Keil;* for Vietnam Veterans of America by *Mary E. Baluss, Samuel M. Sipe, Jr., David F. Addlestone,* and *Barton F. Stichman;* and for Andrew Groza by *James Joseph Lynch, Jr.*

States District Court for the Northern District of California held that this limit violates the Due Process Clause of the Fifth Amendment, and the First Amendment, because it denies veterans or their survivors the opportunity to retain counsel of their choice in pursuing their claims. We noted probable jurisdiction of the Government's appeal, 469 U.S. 1085 (1984), and we now reverse.

I

Congress has by statute established an administrative system for granting service-connected death or disability benefits to veterans. See 38 U.S.C. § 301 *et seq*. The amount of the benefit award is not based upon need, but upon service connection—that is, whether the disability is causally related to an injury sustained in the service—and the degree of incapacity caused by the disability. A detailed system has been established by statute and Veterans' Administration (VA) regulation for determining a veteran's entitlement, with final authority resting with an administrative body known as the Board of Veterans' Appeals (BVA). Judicial review of VA decisions is precluded by statute. 38 U.S.C. § 211(a); *Johnson v. Robison*, 415 U.S. 361 (1974). The controversy in this case centers on the opportunity for a benefit applicant or recipient to obtain legal counsel to aid in the presentation of his claim to the VA. Section 3404(c) of Title 38 provides:

> "The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—
>
> . . . .
>
> "(2) shall not exceed $10 with respect to any one claim. . . . "

Section 3405 provides criminal penalties for any person who charges fees in excess of the limitation of § 3404.

Appellees here are two veterans' organizations, three individual veterans, and a veteran's widow.[1] The two veterans' organizations are the National Association of Radiation Survivors, an organization principally concerned with obtaining compensation for its members for injuries resulting from atomic bomb tests, and Swords to Plowshares Veterans Rights Organization, an organization particularly devoted to the concerns of Vietnam veterans. The complaint contains no further allegation with respect to the numbers of members in either organization who are veteran claimants. Appellees did not seek class certification.

Appellees contended in the District Court that the fee litigation provision of § 3404 denied them any realistic opportunity to obtain legal representation in presenting their claims to the VA and hence violated their rights under the Due Process Clause of the Fifth Amendment and under the First Amendment. The District Court agreed with the appellees on both of these grounds, and entered a nationwide "preliminary injunction" barring appellants from enforcing the fee limitation. 589 F. Supp. 1302 (1984). To understand fully the posture in which the case reaches us it is necessary to discuss the administrative scheme in some detail.

Congress began providing veterans pensions in early 1789, and after every conflict in which the Nation has been involved Congress has, in the words of Abraham Lincoln, "provided for him who has borne the battle, and his widow and his orphan." The VA was created by Congress in 1930, and since that time has been responsible for administering the congressional program for veterans' benefits. In 1978, the year covered by the report of the Legal Services Corporation to Congress that was introduced into evidence in the District Court, approximately 800,000 claims for service-connected disability or death and pensions were decided by the 58 regional offices of the VA. Slightly more than half of these were claims for service-connected disability or death, and the remainder were pension

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1 A fourth individual veteran plaintiff died during the pendency of the proceedings.

claims. Of the 800,000 total claims in 1978, more than 400,000 were allowed, and some 379,000 were denied. Sixty-six thousand of these denials were contested at the regional level; about a quarter of these contests were dropped, 15% prevailed on reconsideration at the local level, and the remaining 36,000 were appealed to the BVA. At that level some 4,500, or 12%, prevailed, and another 13% won a remand for further proceedings. Although these figures are from 1978, the statistics in evidence indicate that the figures remain fairly constant from year to year.

As might be expected in a system which processes such a large number of claims each year, the process prescribed by Congress for obtaining disability benefits does not contemplate the adversary mode of dispute resolution utilized by courts in this country. It is commenced by the submission of a claim form to the local veterans agency, which form is provided by the VA either upon request or upon receipt of notice of the death of a veteran. Upon application a claim generally is first reviewed by a three-person "rating board" of the VA regional office—consisting of a medical specialist, a legal specialist, and an "occupational specialist." A claimant is "entitled to a hearing at any time on any issue involved in a claim ..." 38 CFR § 3.103(c) (1984). Proceedings in front of the rating board "are ex parte in nature," § 3.103(a); no Government official appears in opposition. The principal issues are the extent of the claimant's disability and whether it is service connected. The board is required by regulation "to assist a claimant in developing the facts pertinent to his claim," § 3.103(a), and to consider any evidence offered by the claimant. See § 3.103(b). In deciding the claim the board generally will request the applicant's Armed Service and medical records, and will order a medical examination by a VA hospital. Moreover, the board is

directed by regulation to resolve all reasonable doubts in favor of the claimant. § 3.102.1[2]

After reviewing the evidence the board renders a decision either denying the claim or assigning a disability "rating" pursuant to detailed regulations developed for assessing various disabilities. Money benefits are calculated based on the rating. The claimant is notified of the board's decision and its reasons, and the claimant may then initiate an appeal by filing a "notice of disagreement" with the local agency. If the local agency adheres to its original decision it must then provide the claimant with a "statement of the case"—a written description of the facts and applicable law upon which the board based its determination—so that the claimant may adequately present his appeal to the BVA. Hearings in front of the BVA are subject to the same rules as local agency hearings—they are *ex parte*, there is no formal questioning or cross-examination, and no formal rules of evidence apply. 38 CFR § 19.157 (1984). The

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2 Title 38 CFR § 3.102 (1984) states:

"It is the defined and consistently applied policy of the Veterans Administration to administer the law under a broad interpretation, consistent, however, with the facts shown in every ease. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists by reason of the fact that the evidence does not satisfactorily prove or disprove the claim, yet a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that his claim is well grounded. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not a justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants involving this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships."

BVA's decision is not subject to judicial review. 38 U.S.C. § 211(a).[3]

The process is designed to function throughout with a high degree of informality and solicitude for the claimant. There is no statute of limitations, and a denial of benefits has no formal res judicata effect; a claimant may resubmit as long as he presents new facts not previously forwarded. See 38 CFR §§ 3.104, 3.105 (1984). Although there are time limits for submitting a notice of disagreement and although a claimant may prejudice his opportunity to challenge factual or legal decisions by failing to challenge them in that notice, the time limit is quite liberal—up to one year—and the VA boards are instructed to read any submission in the light most favorable to the claimant. See 38 CFR §§ 19.129, 19.124, 19.121 (1984). Perhaps more importantly for present purposes, however, various veterans' organizations across the country make available trained service agents, free of charge, to assist claimants in developing and presenting their claims. These service representatives are contemplated by the VA statute, 38 U.S.C. § 3402, and they are recognized as an important part of the administrative scheme. Appellees' counsel agreed at argument that a representative is available for any claimant who requests one, regardless of the claimant's affiliation with any particular veterans' group.[4]

In support of their claim that the present statutory and administrative scheme violates the Constitution, appellees submitted affidavits and declarations of 16 rejected claimants or recipients and 24 practicing attorneys, depositions of several VA employees, and various exhibits. The District Court

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[3] Despite the general preclusion of judicial review with respect to VA benefits claims, this Court held in *Johnson v. Robison*, 415 U.S. 361 (1974), that the district courts have jurisdiction to entertain constitutional attacks on the operation of the claims systems.

[4] The VA statistics show that 86% of all claimants are represented by service representatives, 12% proceed *pro se*, and 2% are represented by lawyers. App. 190. Counsel agreed at argument that the 12% who proceed *pro se* do so by their own choice.

held a hearing and then issued a 52-page opinion and order granting the requested "preliminary injunction."[5]

With respect to the merits of appellees' due process claim, the District Court first determined that recipients of service connected death and disability benefits possess "property" interests protected by the Due Process Clause, see *Mathews v. Eldridge*, 424 U.S. 319 (1976) (recipients of Social Security benefits possess a protected "property" interest), and also held that *applicants* for such benefits possess such an interest. Although noting that this Court has never ruled on the latter question, the court relied on several opinions of the Court of Appeals for the Ninth Circuit holding, with respect to similar Government benefits, that applicants possess such an interest. See, *e.g.*, *Ressler v. Pierce*, 692 F. 2d 1212, 1214-1216 (1982) (applicants for federal rent subsidies).

The court then held that appellees had a strong likelihood of showing that the administrative scheme violated the due process rights of those entitled to benefits. In holding that the process described above was "fundamentally unfair," the court relied on the analysis developed by this Court in *Mathews v. Eldridge, supra*, in which we stated the factors that must be weighed in determining what process is due an individual subject to a deprivation:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the ad-

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[5] The District Court rejected appellants' argument that the question presented was controlled by this Court's summary affirmance in *Gendron v. Saxbe*, 389 F. Supp. 1303 (DC Cal.), summarily aff'd *sub nom. Gendron v. Levi*, 423 U.S. 802 (1975). Because we noted probable jurisdiction and heard oral argument in order to decide this case on the merits there is no need for us to determine whether the District Court properly distinguished *Gendron*.

ditional or substitute procedural requirement would entail." 424 U.S., at 335.

In applying this test the District Court relied heavily on appellees' evidence; it noted that the veterans' interest in receiving benefits was significant in that many recipients are disabled, and totally or primarily dependent on benefits for their support. 589 F. Supp., at 1315. With respect to the likelihood of error under the present system, and the value of the additional safeguard of legal representation, it first noted that some of the appellees had been represented by service agents and had been dissatisfied with their representation, and had sought and failed to obtain legal counsel due solely to the fee limitation. The court found that absent expert legal counsel claimants ran a significant risk of forfeiting their rights, because of the highly complex issues involved in some cases. VA processes, the court reasoned, allow claimants to waive points of disagreement on appeal, or to waive appeal altogether by failing to file the notice of disagreement; in addition, claimants simply are not equipped to engage in the factual or legal development necessary in some cases, or to spot errors made by the administrative boards. *Id.*, at 1319-1321.

With respect to whether the present process alleviated these problems, the court found that "neither the VA officials themselves nor the service organizations are providing the full array of services that paid attorneys might make available to claimants." *Id.*, at 1320. Even assuming that all VA personnel were willing to go out of their way for each claimant, a point which the court would not fully accept,[6] the court found that in any event the VA does not have the resources to permit the substantial investments of time that are necessary. The VA

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6 The District Court in its opinion questioned "the extent to which it is possible to serve the interests of both the VA and claimants simultaneously," and suggested that there was a "conflict" and that "the VA personnel might feel some pressure to protect the government purse." 589 F. Supp., at 1320, n. 17. There is no indication of such bias in the record, quite the contrary. Nor are we willing to accept that administrative adjudicators are presumptively subject to such bias.

does not seek independent testimony that might establish service connection, or independent medical examinations with respect to disability.

In reaching its conclusions the court relied heavily on the problems presented by what it described as "complex cases"—a class of cases also focused on in the depositions. Though never expressly defined by the District Court, these cases apparently include those in which a disability is slow developing and therefore difficult to find service connected, such as the claims associated with exposure to radiation or harmful chemicals, as well as other cases identified by the deponents as involving difficult matters of medical judgment. Nowhere in the opinion of the District Court is there any estimate of what percentage of the annual VA caseload of 800,000 these cases comprise, nor is there any more precise description of the class. There is no question but what the 3 named plaintiffs and the plaintiff veteran's widow asserted such claims, and in addition there are declarations in the record from 12 other claimants who were asserting such claims. The evidence contained in the record, however, suggests that the sum total of such claims is extremely small; in 1982, for example, roughly 2% of the BVA caseload consisted of "agent orange" or "radiation" claims, and what evidence there is suggests that the percentage of such claims in the regional offices was even less perhaps as little as 3 in 1,000.

With respect to the service representatives, the court again found the representation unsatisfactory. Although admitting that this was not due to any "lack of dedication," the court found that a heavy caseload and the lack of legal training combined to prevent service representatives from adequately researching a claim. Facts are not developed, and "it is standard practice for service organization representatives to submit merely a one to two page handwritten brief." *Id.*, at 1322.

Based on the inability of the VA and service organizations to provide the full range of services that a retained attorney might, the court concluded that appellees had demonstrated a "high risk of erroneous deprivation" from the process as administered. *Ibid.* The court then found that the Government

had "failed to demonstrate that it would suffer any harm if the statutory fee limitation ... were lifted." *Id.*, at 1323. The only Government interest suggested was the "paternalistic" assertion that the fee limitation is necessary to ensure that claimants do not turn substantial portions of their benefits over to unscrupulous lawyers. The court suggested that there were "less drastic means" to confront this problem.

Finally, the court agreed with appellees that there was a substantial likelihood that the fee limitation also violates the First Amendment. The court relied on this Court's decisions in *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217 (1967), and *Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964), as establishing "the principle that the First Amendment rights to petition, association and speech protect efforts by organizations and individuals to obtain effective legal representation of their constituents or themselves." 589 F. Supp., at 1324. This right to "adequate legal representation" or "meaningful access to courts," the court found, was infringed by the fee limitation—again without substantial justification by the Government. *Id.*, at 1325-1326.

After reiterating the Government's failure of proof with respect to the likely harms arising from doing away with the fee limitation, the court entered a "preliminary injunction" enjoining the Government appellants from "enforcing or attempting to enforce in any way the provisions of 38 U.S.C. §§ 3404-3405 ..." *Id.*, at 1329. The injunction was not limited to the particular plaintiffs, nor was it limited to claims processed in the District of Northern California, where the court sits.

II

Before proceeding to the merits we must deal with a significant question as to our jurisdiction, one not raised by appellees in this Court. This appeal was taken under 28 U.S.C. § 1252, which grants this Court jurisdiction "from an interlocutory or final judgment, decree or order of any court of the United States ... holding an Act of Congress unconstitutional in any civil action ... to which the United States or any of its agencies, or any officer or employee thereof, as such officer or

employee, is a party." We have here an interlocutory decree in a civil action to which an officer of the United States is a party, and the only question is whether the District Court's decision "holds" an Act of Congress unconstitutional. The problem, of course, is that given that the court's opinion and order are cast in terms of a "preliminary injunction" the court only states that there is a "high likelihood of success" on the merits of appellees' claims, and does not specifically state that the fee limitation provision is unconstitutional.

We do not write on a clean slate. In *McLucas v. DeChamplain*, 421 U.S. 21 (1975), this Court similarly entertained an appeal from an order that granted a preliminary injunction and in the process held an Act of Congress unconstitutional. In holding that we had jurisdiction under § 1252 we noted that that section constitutes an "exception" to "the policy ... of minimizing the mandatory docket of this Court," and we went on to state:

> "It might be argued that, in deciding to issue the preliminary injunction, the District Court made only an interlocutory determination of appellee's probability of success on the merits and did not finally 'hold' the article unconstitutional. By its terms, however, § 1252 applies to interlocutory as well as final judgments, decrees, and orders, and this Court previously has found the section properly invoked when the court below has made only an interlocutory determination of unconstitutionality, at least if, as here, that determination forms the necessary predicate to the grant or denial of preliminary equitable relief." *Id.*, at 30.

We think this case is controlled by *McLucas*. It is true that in *McLucas* the District Court actually stated its holding that the statute was unconstitutional, whereas here the court's statements are less direct. But that is merely a semantic difference in this case; inasmuch as any conclusions reached at the preliminary injunction stage are subject to revision, *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), it should make little difference whether the court stated conclusively that a statute was unconstitutional, or merely said it was likely, so

long as the injunction granted enjoined the statute's operation. This Court's appellate jurisdiction does not turn on such semantic niceties. See also *California v. Grace Brethren Church*, 457 U.S. 393, 405 (1982) ("§ 1252 provides jurisdiction even though the lower court did not expressly declare a federal statute unconstitutional ...").

Indeed, we note that the problem raised by the statute's use of the word "holding" may in any event be a bit of a red herring. In its original form § 1252 provided this Court with appellate jurisdiction over decisions "against the constitutionality of any Act of Congress," see Act of Aug. 24, 1937, ch. 754, § 2,50 Stat. 752;[7] although this language was changed when the provision was codified in 1948, so that § 1252 now grants jurisdiction from a decision "*holding* any Act of Congress unconstitutional," this change was effected without substantive comment, and absent such comment it is generally held that a change during codification is not intended to alter the statute's scope. See *Muniz v. Hoffman*, 422 U.S. 454, 467-474 (1975). Any fair reading of the decision at issue would conclude that it is "against the constitutionality" of § 3404, and we are loath to read an unheralded change in phraseology to divest us of jurisdiction here.

Finally, acceptance of appellate jurisdiction in this case is in accord with the purpose of the statutory grant. Last Term, in *Heckler v. Edwards*, 465 U.S. 870 (1984), we discussed § 1252's legislative history. We noted that in enacting § 1252 Congress sought to identify a category of important decisions adverse to the constitutionality of an Act of Congress—which decisions, because the United States or its agent was a party, had impli-

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7 Act of Aug. 24, 1937, ch. 754, § 2, 50 Stat. 752, provided:

"In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party, or in which the United States has intervened and become a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party. ..."

cations beyond the controversy then before the court—and to provide an expeditious means for ensuring certainty and uniformity in the enforcement of such an Act by establishing direct review over such decisions in this Court. *Id.*, at 879-883. Edwards teaches that the decisions Congress targeted for appeal under § 1252 were those which involved the exercise of judicial power to impair the enforcement of an Act of Congress on constitutional grounds, and that it was the constitutional question that Congress wished this Court to decide. As we pointed out in *McLucas*, § 1252 contemplates that this impairment can arise from interlocutory decrees, just as the original statute provided for appeal from decisions in "any proceedings." Cf. *Goldstein v. Cox*, 396 U.S. 471, 476 (1970) (28 U.S.C. § 1253 authorizes direct appeals from preliminary injunctions issued by three-judge courts). A single district judge's interlocutory decision on constitutional grounds that an Act of Congress should not be enforced frustrates the will of Congress in the short run just as surely as a final decision to that effect. By § 1252 Congress gave the Government the right of immediate appeal to this Court in such a situation so that only those district court injunctions which had been reviewed and upheld by this Court would continue to have such an effect. Cf. *Edwards, supra.* The injunction at issue here creates precisely the problem to which § 1252 was addressed, inasmuch as it enjoins the operation of the fee limitation on constitutional grounds, across the country and under all circumstances. Thus, whether or not the injunction here is framed as a "holding" of unconstitutionality we believe we have jurisdiction under § 1252.

III

Judging the constitutionality of an Act of Congress is properly considered "'the gravest and most delicate duty that this Court is called upon to perform,"' *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)), and we begin our analysis here with no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government. Indeed one might

think, if anything, that more deference is called for here; the statute in question for all relevant purposes has been on the books for over 120 years. Cf. *McCulloch v. Maryland*, 4 Wheat. 316, 401-402 (1819). This deference to congressional judgment must be afforded even though the claim is that a statute Congress has enacted effects a denial of the procedural due process guaranteed by the Fifth Amendment. *Schweiker v. McClure*, 456 U.S. 188 (1982); *Mathews v. Eldridge*, 424 U.S., at 349. We think that the District Court went seriously awry in assessing the constitutionality of § 3404.

Appellees' first claim, accepted by the District Court, is that the statutory fee limitation, as it bears on the administrative scheme in operation, deprives a rejected claimant or recipient of "life, liberty or property, without due process of law," U.S. Const., Amdt. 5, by depriving him of representation by expert legal counsel.[8] Our decisions establish that "due process" is a flexible concept—that the processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur. See *Mathews, supra*, at 334; *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In defining the process necessary to ensure "fundamental fairness" we have recognized that the Clause does not require that "the procedures used to guard against an erroneous deprivation ... be so comprehensive as to preclude any possibility of error," *Mackey v. Montrym*, 443 U.S. 1, 13 (1979), and in addition we have em-

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8 The District Court held that applicants for benefits, no less than persons already receiving them, had a "legitimate claim of entitlement" to benefits if they met the statutory qualifications. The court noted that this Court has never so held, although this Court has held that a person receiving such benefits has a "property" interest in their continued receipt. See *Atkins v. Parker*, 472 U.S. 115, 128 (1985); *Mathews v. Eldridge*, 424 U.S. 319 (1976). Since at least one of the claimants here alleged a diminution of benefits already being received, however, we must in any event decide whether "due process" under the circumstances includes the right to be represented by employed counsel. In light of our decision on that question, *infra*, at 334, we need not presently define what class would be entitled to the process requested.

phasized that the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard. See *Mathews*, 424 U.S., at 348.[9]

These general principles are reflected in the test set out in *Mathews*, which test the District Court purported to follow, and which requires a court to consider the private interest that will be affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used, the probable value of additional or substitute procedural safeguards, and the government's interest in adhering to the existing system. *Id.*, at 335. In applying this test we must keep in mind, in addition to the deference owed to Congress, the fact that the very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Id.*, at 344; see also *Parham v. J.R.*, 442 U.S. 584, 612-613 (1979).

The Government interest, which has been articulated in congressional debates since the fee limitation was first enacted in 1862 during the Civil War, has been this: that the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer. See *United States v. Hall*, 98 U.S. 343, 352-355 (1879). This purpose is reinforced by a similar absolute prohibition on compensation of

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[9] See Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1276 (1975):

"It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving."

any service organization representative. 38 U.S.C. 3402(b)(1). While Congress has recently considered proposals to modify the fee limitation in some respects, a Senate Committee Report in 1982 highlighted that body's concern that "any changes relating to attorneys' fees be made carefully so as not to induce unnecessary retention of attorneys by VA claimants and not to disrupt unnecessarily the very effective network of non-attorney resources that has evolved in the absence of significant attorney involvement in VA claims matters." S. Rep. No. 97-466, p. 49 (1982). Although this same Report professed the Senate's belief that the original stated interest in protecting veterans from unscrupulous lawyers was "no longer tenable," the Senate nevertheless concluded that the fee limitation should with a limited exception remain in effect, in order to "protect claimants' benefits" from being unnecessarily diverted to lawyers."[10]

In the face of this congressional commitment to the fee limitation for more than a century, the District Court had only this to say with respect to the governmental interest:

> "The government has neither argued nor shown that lifting the fee limit would harm the government in any way, except as the paternalistic protector of claimants' supposed best interests. To the extent the paternalistic role is valid, there are less drastic means available to

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[10] JUSTICE STEVENS' dissent quotes liberally from this same Senate Committee Report, *post*, at 365-366, apparently intending to suggest that the Committee determined that the fee limitation was no longer justified. The quote is taken out of context, and as such it is quite misleading. The bill with respect to which the Report was issued would have provided for the first time for limited judicial review of BVA decisions. To this end, the Committee determined that "some easing of the limitation on attorneys' fees" would be necessary to allow a claimant to pursue an effective appeal in the federal courts. *But the proposed bill retained the fee limitation for all VA proceedings up to and including the first denial of a claim by the BVA.* In the sections of the Report not quoted by JUSTICE STEVENS the Committee explained that the limitation was retained to "protect claimant's benefits," and because until judicial review was contemplated there was "no need" for attorneys. S. Rep. No. 97-466, p. 50 (1982). Finally, it is worth noting that in any event the proposed bill died in House Committee and thus was never enacted.

ensure that attorneys' fees do not deplete veterans' death or disability benefits." 589 F. Supp., at 1323.

It is not for the District Court or any other federal court to invalidate a federal statute by so cavalierly dismissing a long-asserted congressional purpose. If "paternalism" is an insignificant Government interest, then Congress first went astray in 1792, when by its Act of March 23 of that year it prohibited the "sale, transfer or mortgage ... of the pension ... [of a] soldier ... before the same shall become due." Ch. 11, Section 6, 1 Stat. 245. Acts of Congress long on the books, such as the Fair Labor Standards Act, might similarly be described as "paternalistic"; indeed, this Court once opined that "[s]tatutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual ..." *Lochner v. New York*, 198 U.S. 45, 61 (1905). That day is fortunately long gone, and with it the condemnation of rational paternalism as a legitimate legislative goal.

There can be little doubt that invalidation of the fee limitation would seriously frustrate the oft-repeated congressional purpose for enacting it. Attorneys would be freely employable by claimants to veterans' benefits, and the claimant would as a result end up paying part of the award, or its equivalent, to an attorney. But this would not be the only consequence of striking down the fee limitation that would be deleterious to the congressional plan.

A necessary concomitant of Congress' desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible. This is not to say that complicated factual inquiries may be rendered simple by the expedient of informality, but surely Congress desired that the proceedings be as informal

and nonadversarial as possible.[11] The regular introduction of lawyers into the proceedings would be quite unlikely to further this goal. Describing the prospective impact of lawyers in probation revocation proceedings, we said in *Gagnon v. Scarpelli*, 411 U.S. 778, 787-788 (1973):

> "The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself ... may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual. ... Certainly, the decisionmaking process will be pro-

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[11] The District Court stated in its opinion that "both claimants and attorneys familiar with the VA system view that system as adversarial. ..." 589 F. Supp., at 1321. In reaching this conclusion, the District Court referred to statements by two attorneys and two claimants. One of the attorneys was admitted to practice in California in 1978, but does not take claims before the VA because of the fee limitation. His familiarity with VA procedures was acquired as a certified representative before the VA for appellee Swords to Ploughshares during his time as a law student. The second attorney was admitted to practice in Wisconsin in 1981, and has been a staff member of appellee Swords to Ploughshares since 1980. His representation of veterans has been primarily before discharge boards, but in the course of this representation he has become familiar with VA rules and practices. Both stated that they regarded the VA procedures as "adversarial." Two claimants testified on the basis of their own experience, one that the VA had been "very adversarial" and the other that "the VA has opposed me at every turn. ..."

Anecdotal evidence such as this may well be sufficient to support a finding by a judge or jury in litigation between private parties that a particular fact did or did not exist. But when we deal with a massive benefits program provided by Congress in which 800,000 claims per year are decided by 58 regional offices, and 36,000 claims are appealed to the BVA, it is simply not the sort of evidence that will permit a conclusion that the entire system is operated contrary to its governing regulations.

longed, and the financial cost to the State—for appointed counsel, ... a longer record, and the possibility of judicial review—will not be insubstantial."

We similarly noted in *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974), that the use of counsel in prison disciplinary proceedings would "inevitably give the proceedings a more adversary cast. ..."

Knowledgeable and thoughtful observers have made the same point in other language:

"To be sure, counsel can often perform useful functions even in welfare cases or other instances of mass justice; they may bring out facts ignored by or unknown to the authorities, or help to work out satisfactory compromises. But this is only one side of the coin. Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty. The appearance of counsel for the citizen is likely to lead the government to provide one, or at least to cause the government's representative to act like one. The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy.

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"These problems concerning counsel and confrontation inevitably bring up the question whether we would not do better to abandon the adversary system in certain areas of mass justice. ... While such an experiment would be a sharp break with our tradition of adversary process, that tradition, which has come under serious general challenge from a thoughtful and distinguished judge, was not formulated for a situation in which many thousands of hearings must be provided each month."

Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1287-1290 (1975).

Thus, even apart from the frustration of Congress' principal goal of wanting the veteran to get the entirety of the award, the destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible. It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys. And this additional complexity will undoubtedly engender greater administrative costs, with the end result being that less Government money reaches its intended beneficiaries.

We accordingly conclude that under the *Mathews v. Eldridge* analysis great weight must be accorded to the Government interest at stake here. The flexibility of our approach in due process cases is intended in part to allow room for other forms of dispute resolution; with respect to the individual interests at stake here, legislatures are to be allowed considerable leeway to formulate such processes without being forced to conform to a rigid constitutional code of procedural necessities. See *Parham v. J. R.*, 442 U.S., at 608, n. 16. It would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law. We have no hesitation in deciding that no such showing was made out on the record before the District Court.

As indicated by the statistics set out earlier in this opinion, more than half of the 800,000 claims processed annually by the VA result in benefit awards at the regional level. An additional

10,000 claims succeed on request for reconsideration at the regional level, and of those that do not, 36,000 are appealed to the BVA. Of these, approximately 16% succeed before the BVA. It is simply not possible to determine on this record whether any of the claims of the named plaintiffs, or of other declarants who are not parties to the action, were wrongfully rejected at the regional level or by the BVA, nor is it possible to quantify the "erroneous deprivations" among the general class of rejected claimants. If one regards the decision of the BVA as the "correct" result in every case, it follows that the regional determination against the claimant is "wrong" in the 16% of the cases that are reversed by the Board.

Passing the problems with quantifying the likelihood of an erroneous deprivation, however, under *Mathews* we must also ask what value the proposed additional procedure may have in reducing such error. In this case we are fortunate to have statistics that bear directly on this question, which statistics were addressed by the District Court. These unchallenged statistics chronicle the success rates before the BVA depending on the type of representation of the claimant, and are summarized in the following figures taken from the record. App. 568.

ULTIMATE SUCCESS RATES BEFORE THE BOARD OF VETERANS' APPEALS BY MODE OF REPRESENTATION

American Legion	16.2%
American Red Cross	16.8%
Disabled American Veterans	16.6%
Veterans of Foreign Wars	16.7%
Other Non-attorney	15.8%
No Representation	15.2%
Attorney/Agent	18.3%

The District Court opined that these statistics were not helpful, because in its view lawyers were retained so infrequently that no body of lawyers with an expertise in VA practice had developed, and lawyers who represented veterans regularly might do better than lawyers who represented them only *pro bono* on a sporadic basis. The District Court felt that a more reliable index of the effect lawyers would have on the

proceedings was a statistical study showing success of various representatives in appeals to discharge review boards of the uniformed services—statistics that showed a significantly higher success rate for those claimants represented by lawyers as compared to those claimants not so represented.

We think the District Court's analysis of this issue totally unconvincing, and quite lacking in the deference which ought to be shown by any federal court in evaluating the constitutionality of an Act of Congress. We have the most serious doubt whether a competent lawyer taking a veteran's case on a *pro bono* basis would give less than his best effort, and we see no reason why experience in developing facts as to causation in the numerous other areas of the law where it is relevant would not be readily transferable to proceedings before the VA. Nor do we think that lawyers' success rates in proceedings before military boards to upgrade discharges—proceedings which are not even conducted before the VA, but before military boards of the uniformed services—are to be preferred to the BVA statistics which show reliable success by mode of representation in the very type of proceeding to which the litigation is devoted.

The District Court also concluded, apparently independently of its ill-founded analysis of the claim statistics, (1) that the VA processes are procedurally, factually, and legally complex, and (2) that the VA system presently does not work as designed, particularly in terms of the representation afforded by VA personnel and service representatives, and that these representatives are "unable to perform all of the services which might be performed by a claimant's own paid attorney." 589 F. Supp., at 1322. Unfortunately the court's findings on "complexity" are based almost entirely on a description of the plan for administering benefits in the abstract, together with references to "complex" cases involving exposure to radiation or agent orange, or post-traumatic stress syndrome. The court did not attempt to state even approximately how often procedural or substantive complexities arise in the run-of-the-mine case, or even in the unusual case. The VA procedures cited by the court do permit a claimant to prejudice his

rights by failing to respond in a timely manner to an agency notice of denial of an initial claim, but despite this possibility there is nothing in the District Court's opinion indicating that these procedural requirements have led to an unintended forfeiture on the part of a diligent claimant. On the face of the procedures, the process described by the District Court does not seem burdensome: one year would in the judgment of most be ample time to allow a claimant to respond to notice requesting a response. In addition, the VA is required to read any submission in the light most favorable to the claimant, and service representatives are available to see that various procedural steps are complied with. It may be that the service representative cannot, as the District Court hypothesized, provide all the services that a lawyer could, but there is no evidence in the record that they cannot or do not provide advice about time limits.

The District Court's opinion is similarly short on definition or quantification of "complex" cases. If this term be understood to include all cases in which the claimant asserts injury from exposure to radiation or agent orange, only approximately 3 in 1,000 of the claims at the regional level and 2% of the appeals to the BVA involve such claims. Nor does it appear that all such claims would be complex by any fair definition of that term: at least 25% of all agent orange cases and 30% of the radiation cases, for example, are disposed of because the medical examination reveals no disability. What evidence does appear in the record indicates that the great majority of claims involve simple questions of fact, or medical questions relating to the degree of a claimant's disability; the record also indicates that only the rare case turns on a question of law. There are undoubtedly "complex" cases pending before the VA, and they are undoubtedly a tiny fraction of the total cases pending. Neither the District Court's opinion nor any matter in the record to which our attention has been directed tells us more than this.

The District Court's treatment of the likely usefulness of attorneys is on the same plane with its efforts to quantify the likelihood of error under the present system. The court states

several times in its opinion that lawyers could provide more services than claimants presently receive—a fact which may freely be conceded—but does not suggest how the availability of these services would reduce the likelihood of error in the run-of-the-mine case. Simple factual questions are capable of resolution in a nonadversarial context, and it is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment. Cf. *Parham v. J.R.*, 442 U.S., at 609-612. The availability of particular lawyers' services in so-called "complex" cases might be more of a factor in preventing error in such cases, but on this record we simply do not know how those cases should be defined or what percentage of all of the cases before the VA they make up. Even if the showing in the District Court had been much more favorable, appellees still would confront the constitutional hurdle posed by the principle enunciated in cases such as *Mathews* to the effect that a process must be judged by the generality of cases to which it applies, and therefore a process which is sufficient for the large majority of a group of claims is by constitutional defini-

tion sufficient for all of them. But here appellees have failed to make the very difficult factual showing necessary.[12]

Reliable evidence before the District Court showed that claimants represented by lawyers have a slightly better success rate before the BVA than do claimants represented by service representatives, and that both have a slightly better success rate than claimants who were not represented at all. Evidence also showed that there may be complex issues of causation in comparatively few of the hundreds of thousands of cases before the VA, but there is no adequate showing of the effect the availability of lawyers would have on the proper disposition of these cases. Neither the difference in success rate nor the existence of complexity in some cases is sufficient to warrant a

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12 Our understanding of the operation of the claims process is further bolstered by the findings of the Senate Committee alluded to earlier. As noted *supra*, at 322, that Committee conducted an extensive inquiry into the process in connection with several proposed bills that would have provided for judicial review of BVA decisions, and also would have withdrawn the fee limitation for proceedings occurring after the first denial by the BVA, while retaining the limitation for proceedings prior to that time. The Committee Report accompanying a 1982 bill noted its belief that the claims process presently operates informally and nonadversarially, that there was no evidence that most claimants were not satisfied with the VA's resolution of their claims, that there was in general "no need" for attorneys inasmuch as applying for benefits was a "relatively uncomplicated procedure," and that the service organizations afforded a "high quality of representation." S. Rep. No. 97-466, pp. 25, 49-50 (1982). Each bill unanimously passed the Senate, but died in House Committee, leaving the present system in operation. See S. 349, 97th Cong., 2d Sess (1982); S. 636, 98th Cong., 1st Sess. (1983).

When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue. See *Rostker v. Goldberg*, 453 U.S. 57, 72-73 (1981); *Vance v. Bradley*, 440 U.S. 93, 111-112 (1979); *Katzenbach v. McClung*, 379 U.S. 294 (1964). Because we do not believe the record in the District Court contradicted these findings, however, we need not rely on them, or determine what deference must be afforded on this congressional record; we mention the Committee's findings only because they are entirely consistent with our understanding of the record developed in the District Court.

conclusion that the right to retain and compensate an attorney in VA cases is a necessary element of procedural fairness under the Fifth Amendment.

We have in previous cases, of course, held not only that the Constitution permits retention of an attorney, but also that on occasion it requires the Government to provide the services of an attorney. The Sixth Amendment affords representation by counsel in all criminal proceedings, and in cases such as *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972), we have held that this provision requires a State prosecuting an indigent to afford him legal representation for his defense. No one would gainsay that criminal proceedings are adversarial in nature, and of course the Sixth Amendment applies only to such proceedings.

In cases such as *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), we observed that counsel can aid in identifying legal questions and presenting arguments, and that one charged with probation violation may have a right to counsel because of the liberty interest involved. We have also concluded after weighing the *Mathews* factors that the right to appointed counsel in a case involving the threatened termination of parental rights depends upon the circumstances of each particular case, see *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18 (1981), while three of the dissenters thought the same balancing required appointment of counsel in all such cases. *Id.*, at 35 (BLACKMUN, J., joined by BRENNAN and MARSHALL, JJ., dissenting).

But where, as here, the only interest protected by the Due Process Clause is a property interest in the continued receipt of Government benefits, which interest is conferred and terminated in a nonadversary proceeding, these precedents are of only tangential relevance. Appellees rely on *Goldberg v. Kelly*, 397 U.S. 254 (1970), in which the Court held that a welfare recipient subject to possible termination of benefits was entitled to be represented by an attorney. The Court said that "counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." *Id.*, at 270-271. But in

defining the process required the Court also observed that "the crucial factor in this context ... is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. ... His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." *Id.*, at 264 (emphasis in original).

We think that the benefits at stake in VA proceedings, which are not granted on the basis of need, are more akin to the Social Security benefits involved in *Mathews* than they are to the welfare payments upon which the recipients in *Goldberg* depended for their daily subsistence. Just as this factor was dispositive in *Mathews* in the Court's determination that no evidentiary hearing was required prior to a temporary deprivation of benefits, 424 U.S., at 342-343, so we think it is here determinative of the right to employ counsel. Indeed, there appears to have been no stated policy on the part of New York in *Goldberg* against permitting an applicant to divide up his welfare check with an attorney who had represented him in the proceeding; the procedures there simply prohibited personal appearance of the recipient with or without counsel and regardless of whether counsel was compensated, and in reaching its conclusion the Court relied on agency regulations allowing recipients to be represented by counsel under some circumstances. 424 U.S., at 342-343.

This case is further distinguishable from our prior decisions because the process here is not designed to operate adversarially. While counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding, where as here no such adversary appears, and in addition a claimant or recipient is provided with substitute safeguards such as a competent representative, a decisionmaker whose duty it is to aid the claimant, and significant concessions with respect to the claimant's burden of proof, the need for counsel is considerably diminished. We have expressed similar concerns in other cases holding that counsel is not required in various proceedings that do not approximate

trials, but instead are more informal and nonadversary. See *Parham v. J. R.*, 442 U.S., at 608-609; *Goss v. Lopez*, 419 U.S. 565, 583 (1975); *Wolff v. McDonnell*, 418 U.S., at 570.

Thus none of our cases dealing with constitutionally required representation by counsel requires the conclusion reached by the District Court. Especially in light of the Government interests at stake, the evidence adduced before the District Court as to success rates in claims handled with or without lawyers shows no such great disparity as to warrant the inference that the congressional fee limitation under consideration here violates the Due Process Clause of the Fifth Amendment. What evidence we have been pointed to in the record regarding complex cases falls far short of the kind which would warrant upsetting Congress' judgment that this is the manner in which it wishes claims for veterans' benefits adjudicated. *Schweiker v. McClure*, 456 U.S. 188, 200 (1982); *Mathews*, 424 U.S., at 344, 349. The District Court abused its discretion in holding otherwise.

IV

Finally, we must address appellees' suggestion that the fee limitation violates their First Amendment rights. Appellees claim that cases such as *Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217 (1967), and *Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964), establish for individuals and organizations a right to ensure "meaningful access to courts" for themselves or their members, and that the District Court was correct in holding that this right was violated by the fee limitation. There are numerous conceptual difficulties with extending the cited cases to cover the situation here; for example, those cases involved the rights of unions and union members to retain or recommend counsel for proceedings where counsel were allowed to appear, and the First Amendment interest at stake was primarily the right to associate collectively for the common good. In contrast, here the asserted First Amendment interest is primarily the individual interest in best prosecuting a claim, and the limitation challenged applies across-the-board to individuals and organizations alike.

But passing those problems, appellees' First Amendment arguments, at base, are really inseparable from their due process claims. The thrust is that they have been denied "meaningful access to the courts" to present their claims. This must be based in some notion that VA claimants, who presently are allowed to speak in court, and to have someone speak for them, also have a First Amendment right to pay their surrogate speaker;[13] beyond that questionable proposition, however, even as framed appellees' argument recognizes that such a First Amendment interest would attach only in the absence of a "meaningful" alternative. The foregoing analysis of appellees' due process claim focused on substantially the same question—whether the process allows a claimant to make a meaningful presentation—and we concluded that appellees had such an opportunity under the present claims process, and that significant Government interests favored the limitation on "speech" that appellees attack. Under those circumstances appellees' First Amendment claim has no independent significance. The decision of the District Court is accordingly

Reversed.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN joins, concurring.

I join the Court's opinion and its judgment because I agree that this Court has appellate jurisdiction under 28 U.S.C. § 1252 and that the District Court abused its discretion in issuing a nationwide preliminary injunction against enforcement of the $10 fee limitation in 38 U.S.C. § 3404(c). I also agree that the record before us is insufficient to evaluate the claims of

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13 "The dissent quotes from our decision in *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 493 (1985), *post*, at 364, n. 13, as if the analysis in that case answers the issues raised here. One would think that another proposition "so obvious that [it] seldom need[s] to be stated explicitly," *post*, at 368, n. 16, is that the constitutional analysis of a regulation that restricts core political speech, such as the regulation at issue in FEC, will differ from the constitutional analysis of a restriction on the available resources of a claimant in Government benefit proceedings.

any individuals or identifiable groups. I write separately to note that such claims remain open on remand.

The grant of appellate jurisdiction under § 1252 does not give the Court license to depart from established standards of appellate review. This Court, like other appellate courts, has always applied the "abuse of discretion" standard on review of a preliminary injunction. See, *e. g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-932 (1975). As the Court explains, direct appeal of a preliminary injunction under § 1252 is appropriate in the rare case such as this where a district court has issued a nationwide injunction that in practical effect invalidates a federal law. In such circumstances, § 1252 "assure[s] an expeditious means of affirming or removing the restraint on the Federal Government's administration of the law. ..." *Heckler v. Edwards*, 465 U.S. 870, 882 (1984). See also *id.*, at 881, nn. 15 and 16 (§ 1252 is closely tied to the need to speedily resolve injunctions preventing the effectuation of Acts of Congress). Contrary to the suggestion of JUSTICE BRENNAN, *post*, at 355, the Court fully effectuates the purpose of § 1252 by vacating the preliminary injunction which the District Court improperly issued. Since the District Court did not reach the merits, any cloud on the constitutionality of the $10 fee limitation that remains after today's decision is no greater than exists prior to judgment on the merits in any proceeding questioning a statute's constitutionality.

A preliminary injunction is only appropriate where there is a demonstrated likelihood of success on the merits. *Doran v. Salem Inn, Inc., supra.* In order to justify the sort of categorical relief the District Court afforded here, the fee limitation must pose a risk of erroneous deprivation of rights in the generality of cases reached by the injunctive relief. Cf. *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). Given the nature of the typical claim and the simplified Veterans' Administration procedures, the record falls short of establishing any likelihood of such sweeping facial invalidity. *Ante*, at 329-330.

As the Court observes, the record also "is ... short on definition or quantification of 'complex' cases" which might constitute a "group" with respect to which the process pro-

vided is "[in]sufficient for the large majority." *Ante*, at 329, 330; *Parham v. J.R.*, 442 U.S. 584, 617 (1979). The "determination of what process is due [may] var[y]" with regard to a group whose "situation differs" in important respects from the typical veterans' benefit claimant. *Parham v. J.R., supra*, at 617. Appellees' claims, however, are not framed as a class action nor were the lower court's findings and relief narrowly drawn to reach some discrete class of complex cases. In its present posture, this case affords no sound basis for carving out a subclass of complex claims that by their nature require expert assistance beyond the capabilities of service representatives to assure the veterans "'[a] hearing appropriate to the nature of the case.'" *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *Ante*, at 329.

Nevertheless, it is my understanding that the Court, in reversing the lower court's preliminary injunction, does not determine the merits of the appellees' individual "as applied" claims. The complaint indicates that appellees challenged the fee limitation both on its face and as applied to them, and sought a ruling that they were entitled to a rehearing of claims processed without assistance of an attorney. I App. 39-42. Appellee Albert Maxwell, for example, alleges that his service representative retired and failed to notify him that he had dropped his case. Mr. Maxwell's records indicate that he suffers from the after effects of malaria contracted in the Bataan death march as well as from multiple myelomas allegedly a result of exposure to radiation when he was a prisoner of war detailed to remove atomic debris in Japan. *Id.*, at 45-89. Maxwell contends that his claims have failed because of lack of expert assistance in developing the medical and historical facts of his case. As another example, Doris Wilson, a widow who claims her husband's cancer was contracted from exposure to atomic testing, alleges her service representative waived her right to a hearing because he was unprepared to represent her. She contends her claim failed because she was unable without assistance to obtain service records and medical information. *Id.*, at 217.

The merits of these claims are difficult to evaluate on the record of affidavits and depositions developed at the preliminary injunction stage. Though the Court concludes that denial of expert representation is not "*per se* unconstitutional," given the availability of service representatives to assist the veteran and the Veterans' Administration boards' emphasis on non-adversarial procedures, "[o]n remand, the District Court is free to and should consider any individual claims that [the procedures] did not meet the standards we have described in this opinion." *Parham v. J.R., supra*, at 616-617.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court today concludes that it has mandatory jurisdiction pursuant to 28 U.S.C. § 1252 directly to review the District Court's entry of a preliminary injunction restraining the Government from enforcing the provisions of 38 U.S.C. §§ 3404 and 3405 pending a full trial on the merits of appellees' contention that those statutes violate the First and Fifth Amendments. *Ante*, at 316-319.[1] The Court then proceeds to sustain the constitutionality of those statutes on the ground that "the process allows a claimant to make a meaningful presentation" on behalf of his claim for service-connected death and disability benefits even without the assistance of his attorney. *Ante*, at 335. The Court having reached this issue, I feel constrained to note my strong disagreement on the merits for the reasons eloquently set forth in JUSTICE STEVENS' dissent, which I join.

I write separately, however, because I believe the Court's exercise of appellate jurisdiction in this case is not authorized by § 1252. Because the District Court's interlocutory order granting a preliminary injunction did not constitute a decision

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[1] Title 38 U.S.C. § 3404 prohibits a veteran or his survivors from paying more than $10 to an attorney for assistance in attempting to obtain service-connected death and disability benefits, and § 3405 provides that any attorney who receives more than $10 in these circumstances "shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both."

striking down the challenged statutes on constitutional grounds, appellate review of the propriety and scope of the preliminary injunction instead rests initially in the Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1292(a)(1), from which review in this Court could then be sought through a petition for a writ of certiorari. The Court's decision to the contrary is wholly inconsistent with the purpose and history of § 1252, well-established principles respecting interlocutory review of preliminary injunctions, and common sense.

I

The District Court did not hold that §§ 3404 and 3405 are unconstitutional either on their face or as applied. Instead, for purposes of considering the appellees' motion for a pretrial preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, it found that appellees had "demonstrated a high likelihood of prevailing" on the merits of their due process and First Amendment challenges. 589 F. Supp. 1302, 1323 (ND Cal. 1984); see also *id.*, at 1307, 1327, 1329. The court then weighed the potential for irreparable injury and the balance of hardships in light of this likelihood of success. It found that the appellees had "shown the irreparable injury necessary to obtain injunctive relief" and concluded that "the balance of hardship also weighs heavily in [their] favor."

Id., at 1329.[2] Accordingly, the court entered a broad preliminary injunction restraining enforcement of the challenged statutes "pending a trial on the merits of the above-entitled action." *Ibid.* As this Court was advised at oral argument, the appellees contemplate further extensive discovery and a full trial on the underlying First and Fifth Amendment issues. Tr. of Oral Arg. 31-32.[3]

Contrary to the Court's assertion, there is much more than a "semantic difference" between a finding of likelihood of success sufficient to support preliminary relief and a final holding on the merits. *Ante*, at 317. Until today, the Court always has recognized that district court findings on "likelihood of suc-

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2 The court noted that "the government has submitted absolutely no evidentiary support" for its claim of potential hardship from the entry of preliminary relief. 589 F. Supp., at 1328, n. 23. Appellees, on the other hand, had pointed to a number of alleged hardships in support of their motion: (1) "a substantial number of SCDDC Claimants who would be forced to proceed without a lawyer during the pendency of this litigation would go on to lose or abandon their claims"; (2) "the fee limitation exacts a heavy toll in terms of Claimants' ability to petition the V.A. for a redress of grievances, access to the V.A., and fundamental rights of free speech and association," it being well established that the "loss of First Amendment freedoms, even temporarily, constitutes irreparable injury"; and (3) "many veterans, and particularly those whose cancer claims arise out of radiation or Agent Orange exposure such as Maxwell, Cordray and Warehime, may die prior to trial on the merits. For these veterans, the instant motion is their only opportunity for redress. Indeed, one of the intended plaintiffs herein, Charles Targett, died of brain cancer before this action could even be filed." Plaintiffs' Memorandum of Points and Authorities in Support of Application for a Preliminary Injunction, No. C-83-1861 MHP, pp. 17-19 (ND Cal. Nov. 14, 1983) (emphasis added) (Preliminary Injunction Memorandum). See also Exhibit E, Declaration of Gordon P. Erspamer ¶ 3, attached to Preliminary Injunction Memorandum ("Based upon my knowledge of the medical conditions of Messrs. Maxwell, Cordray and Warehime, and my acquaintance with their medical records, I believe, regrettably, there is a substantial possibility that one or more of them will not survive through trial").

3 As the District Court observed, "[a]t oral argument [before that court] attorneys for both plaintiffs and defendants agreed that this was a motion solely for preliminary injunctive relief and not for permanent injunctive relief." 589 F. Supp., at 1307, n. 5.

cess on the merits" are *not* "tantamount to decisions on the underlying merits"; the two are "significantly different." *University of Texas v. Camenisch*, 451 U.S. 390, 393-394 (1981). Preliminary injunctions are granted on the basis of a broad "balance of factors" determined through "procedures that are less formal and evidence that is less complete than in a trial on the merits," and the parties are accorded neither "a full opportunity to present their cases nor ... a final judicial decision based on the actual merits of a controversy." *Id.*, at 395-396 (emphasis added). District court orders granting preliminary injunctions may therefore be reviewed only on an abuse-of-discretion standard: an appellate court may conclude that the district court's preliminary relief sweeps too broadly, or is based on an improper balancing of hardships, or even that the likelihood of success has been overdrawn. See generally *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-932 (1975); *Brown v. Chote*, 411 U.S. 452, 457 (1973). But under the abuse-of-discretion standard, appellate courts obviously may "intimate no view as to the ultimate merits" of the underlying controversy. *Doran v. Salem Inn, Inc., supra*, at 934; *Brown v. Chote, supra*, at 457.[4] For several reasons, this is particularly true where "grave, far-reaching constitutional questions" are presented: the records developed in preliminary-injunction cases are "simply insufficient" to allow a final decision on the merits; as a matter of fairness the litigants are entitled to a full evidentiary presentation before a final decision is reached; and where questions of constitutional law turn on disputed fact,[5] such decisions must initially be rendered by a district court factfinder. *Brown v. Chote, supra*, at 457.

Section 1252 does not empower this Court directly to police the preliminary-injunctive process in the district courts.

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4 See generally *United States v. Corrick*, 298 U.S. 435 (1936); *Alabama v. United States*, 279 U.S. 229 (1929); *United Fuel Gas Co. v. Public Service Comm'n of West Virginia*, 278 U.S. 322 (1929); R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States §§ 196, 208, 217 (1951).

5 As in the due process balancing inquiry conducted by the District Court in this case pursuant to *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Instead, it was enacted to ensure the "prompt determination by the court of last resort of disputed questions of the *constitutionality* of acts of the Congress."[6] Whether one relies on the codified language—permitting a direct appeal from a lower-court decision *"holding* an Act of Congress unconstitu-

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6 H. R. Rep. No. 212, 75th Cong., 1st Sess., 2 (1937) (emphasis added). See also H. R. Conf. Rep. No. 1490, 75th Cong., 1st Sess. (1937); S. Rep. No. 963, 75th Cong., 1st Sess. (1937). Remarks during floor debate reinforce the conclusion that § 1252 was intended to provide mandatory Supreme Court review only where the underlying constitutional issue was properly presented for dispositive resolution. See, *e. g.*, 81 Cong. Rec. 3254 (1937) (remarks of Rep. Sumners) (provision would enable an appeal "directly to the Supreme Court from an adverse decision on the question of constitutionality"); *id.*, at 3256 (remarks of Rep. Brewster) (provision designed to "obviate delays in our courts so far as determination of constitutional questions is concerned"); *id.*, at 3260-3261 (remarks of Rep. Sumners) (case "would come up on the question of constitutionality; "[w]hen the question of the constitutionality of an act of Congress is raised, and it is a serious question, it is the judgment of the members of the committee that that question ought to be presented to the Supreme Court just as quickly as it can be carried there properly"); *id.*, at 3267 (remarks of Rep. McFarlane) (provision would "expedite the testing of the constitutionality of acts of Congress"); *id.*, at 3272 (remarks of Rep. Sumners) ("where ... the decision is adverse to the constitutionality of the act in question, the Government, in such event, may appeal directly to the Supreme Court in order to expedite the determination of the constitutional question"). See also Frankfurter & Fisher, The Business of the Supreme Court at the October Terms, 1935 and 1936, 51 Harv. L. Rev. 577, 614, 616-617 (1938) (the "essence" of the legislation now codified as § 1252 was to ensure "a speedy test" of the constitutionality of a federal statute by promptly "securing the final word from the Supreme Court").

tional"[7]—or on the original language of the statute—permitting a direct appeal where "the decision is *against* the constitutionality of any Act of Congress"[8]—it is obvious that § 1252 contemplates a fully consummated lower-court decision of unconstitutionality so that this Court may carry out the statutory purpose of rendering a prompt and dispositive determi-

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7 Title 28 U.S.C. § 1252 provides in full:

"Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

"A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court."

8 The Judiciary Act of 1937, § 2, 50 Stat. 752, provided in full:

"In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party or in which the United States has intervened and become a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit or proceeding upon application therefor or notice thereof within thirty days after the entry of a final or interlocutory judgment, decree, or order; and in the event that any such appeal is taken, any appeal or cross-appeal by any party to the suit or proceeding taken previously, or taken within sixty days after notice of an appeal under this section, shall also be or be treated as taken directly to the Supreme Court of the United States. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law."

nation respecting the constitutionality of the challenged legislation. Jurisdiction pursuant to § 1252 accordingly is proper *only* where "the basis of the decision below *in fact* was that the Act of Congress was unconstitutional," *United States v. Rainies*, 362 U.S. 17, 20 (1960) (emphasis added)[9]—and "likelihood" simply does not equate with "in fact." Where a district court merely has concluded that there is a "likelihood" of unconstitutionality sufficient to support temporary relief, § 1252's underlying purpose cannot be fulfilled because this Court (if faithful to precedent) cannot resolve the "ultimate merits" of the underlying constitutional issue. *Doran v. Salem Inn Inc.*, 422 U.S., at 934; *Brown v. Chote*, 411 U.S., at 457. Instead, all the Court could do would be to consider whether the nature or scope of preliminary relief constituted abuses of discretion, and perhaps to disagree with the district court respecting the "likelihood" that the appellees ultimately would prevail. In my opinion, these questions relating to the supervision of the injunctive process are not subsumed in § 1252 and properly are left in the first instance to the courts of appeals.

The Court argues, however, that because § 1252 explicitly grants jurisdiction to this Court "from an *interlocutory* or final judgment" of unconstitutionality, Congress surely intended to include preliminary injunctions granted on "likelihood of success" within the scope of § 1252. *Ante*, at 316317, 318-319. The Court reinforces this argument by noting that *all* interlocutory decisions, even if cast in dispositive terms, "are subject to revision" before entry of final judgment. *Ante*, at 317. This argument is wholly unpersuasive. As demonstrated by the large body of precedent applying 28 U.S.C. §§ 1291 and 1292(a), there is a substantial difference between interlocutory decisions that are "tentative, informal or incomplete"[10] and those

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9 See also *Heckler v. Edwards*, 465 U.S. 870, 877 (1984); *McLucas v. DeChamplain*, 421 U.S. 21, 30-31 (1975); *United States v. Christian Echoes National Ministry, Inc.*, 404 U.S. 561, 563-566 (1972) (*per curiam*); *Fleming v. Rhodes*, 331 U.S. 100, 103-104 (1947); *Garment Workers v. Donnelly Garment Co.*, 304 U.S. 243, 249 (1938).

10 *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

that for all practical purposes "conclusively determine the disputed question."[11] Interlocutory decisions falling within the latter category may, in a small set of circumstances, be immediately appealed because they represent "fully consummated decisions" on the matter in question that are capable of being reviewed and dispositively affirmed or reversed."[12] The "bare fact"[13] that every order short of a final decree is theoretically "subject to reopening at the discretion of the district judge" is insufficient to preclude review in these circumstances."[14] Instead, interlocutory appeals to the courts of appeals pursuant to §§ 1291 and 1292(a) are proper when no further consideration of the disputed issue is contemplated by the district court and when, as a practical matter, there is "no basis to suppose" that the resolution is anything less than definite.[15]

Where the disputed decision "remains open, unfinished or inconclusive," on the other hand, it is well established that under §§ 1291 and 1292(a) "there may be no intrusion by appeal" of the unresolved issue.[16] The reasons are manifest. If the appellate court addressed the issue in such an inconclusive posture, it either would render an advisory opinion that had no binding effect or, if binding effect were intended, would usurp the authority of the district court to pass on the issue in

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11 *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

12 *Abney v. United States*, 431 U.S. 651, 659 (1977).

13 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3911, p. 470 (1976) (Wright, Miller, & Cooper).

14 *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U. S. 1, 12 (1983).

15 *Id.*, at 13. See generally *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375 (1981); *United States v. MacDonald*, 435 U. S. 850, 854-855 (1978); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974).

16 *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S., at 546.

the first instance. "Appeal gives the upper court a power of review, not one of intervention."[17]

This elementary distinction applies with direct force to appeals pursuant to § 1252.[18] Where a district court issues an interlocutory order based on a fully consummated determination that a federal statute is unconstitutional, an appeal is proper because the constitutional question can authoritatively be decided with dispatch. Thus in *Fleming v. Rhodes*, 331 U.S. 100, 102 (1947), the District Court had denied preliminary relief enjoining the eviction of tenants on the ground that the federal statute prohibiting the evictions was unconstitutional. And in *McLucas v. DeChamplain*, 421 U.S. 21, 26-27 (1975), the District Court for the District of Columbia had preliminarily enjoined the enforcement of a statute in reliance on a decision by the Court of Appeals for the District of Columbia Circuit that the statute was unconstitutional—"a decision," we noted, that was "binding on the District Court," *id.*, at 28. In neither case was there any basis to believe that the interlocutory holding of unconstitutionality was anything but final.

On the other hand, we have never in the 48-year history of § 1252 assumed jurisdiction where the district court had done no more than simply determine that there was a "likelihood" of unconstitutionality sufficient to support temporary relief pending a final decision on the merits. Because such determinations are inherently "open, unfinished [and] inconclusive,"[19] the only proper questions for immediate appellate consideration would be whether the entry and scope of pre-

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[17] *Ibid.* See also *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (opinion of Jackson, J.) ("[I]t is a final decision that Congress has made reviewable.... While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment") (emphasis in original).

[18] Similar distinctions have evolved concerning the scope of our jurisdiction over "final" state-court judgments or decrees pursuant to 28 U.S.C. § 1257. See, *e.g.*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-487 (1975); *Construction Laborers v. Curry*, 371 U.S. 542, 548-551 (1963).

[19] *Cohen v. Beneficial Industrial Loan Corp.*, *supra*, at 546.

liminary relief were abuses of discretion. But such review is not the purpose of § 1252 because, as the Court today concedes, "it was the *constitutional* question that Congress wished this Court to decide." *Ante*, at 318 (emphasis added).[20] If the Court did address the constitutional issue in these circumstances, it either would be rendering an advisory opinion subject to revision once the district court reached the merits or, to the extent it purported to pass on the issue with finality, would be exercising a forbidden "power ... of intervention" rather than of review.[21] We have long recognized that such

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[20] When Congress created the exceptional right to bypass the court of appeals, it directly linked that right to a lower court's invalidation of an Act of Congress. Although it is in the nature of cases and controversies that the court's judgment may address not only the issue of statutory constitutionality, but other issues as well, such as attorney's fees, *remedy*, or related state-law claims, the natural sense of the jurisdictional provision is that *the holding of statutory unconstitutionality, not these other issues, is what Congress wished this Court to review in the first instance.*

"Because direct review, is linked to a court's holding a federal statute unconstitutional, the logical test of which appeals from a judgment must be brought directly to this Court and which, standing alone, must follow the normal route of appellate review, *is whether the issue on appeal is the holding of statutory unconstitutionality.*" *Heckler v. Edwards*, 465 U.S. at 880 (emphasis added).

[21] *Cohen v. Beneficial Industrial Loan Corp., supra*, at 546.

intervention is barred under §§ 1291 and 1292(a), and should have so recognized here as well.[22]

The Court contends, however, that the District Court in this case enjoined the challenged statute "across the country and under all circumstances," and that immediate mandatory appeal to this Court therefore "is in accord with the purpose of the statutory grant"—provision of "an expeditious means for ensuring certainty and uniformity in the enforcement of such an Act." *Ante*, at 318-319. See also *ante*, at 336-337 (O'CONNOR, J., concurring). Congress unquestionably intended by § 1252 to provide an "expeditious" means for resolving constitutional questions,[23] but an appeal is proper only when it is those questions themselves that have been decided a condition not met in preliminary-injunction cases where, as here, we may "intimate no view as to the ultimate merits" of the underlying controversy. *Doran v. Salem Inn, Inc.*, 422 U.S., at 934.

Moreover, the Court's reasoning sweeps both too narrowly and too broadly. It sweeps too narrowly because mandatory

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22 The Court argues that the finality issue is a "bit of a red herring" given that the original version of § 1252, see n. 8, *supra*, provided jurisdiction over decisions "against the constitutionality of any Act of Congress," and that "[a]ny fair reading of the decision at issue would conclude that it is 'against the constitutionality of the challenged statutes. *Ante*, at 318. I disagree. *Every* district court order in litigation such as this that denies a motion to dismiss or for summary judgment, grants a temporary restraining order, see n. 26, *infra*, or even allows discovery to proceed based on the substantiality of the plaintiff's claim could be characterized as being "against" the validity of a statute in the sense that it is not squarely "for" the statute, else the litigation would be terminated. Preliminary injunctions based on "likelihood" of success do, to be sure, represent a more definite degree of doubt respecting the statute than, say, an order denying summary judgment based on "genuine issues" remaining. Cf. Fed. Rule Civ. Proc. 56(c). But these are differences of degree and not of kind. A decision cannot squarely be "against" the constitutionality of a statute if the constitutional question is still "open, unfinished [and] inclusive." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546.

23 See legislative history discussed in n. 6, *supra*.

jurisdiction pursuant to § 1252 is not confined to district court decisions striking down statutes "across the country and under all circumstances." *Ante*, at 319. See also *ante*, at 336 (O'CONNOR, J., concurring). We have instead long recognized that § 1252 requires that we review decisions that simply invalidate challenged statutes even as applied only to particular individuals in particular circumstances.[24] Allowing an immediate appeal in these circumstances is thought to further the "great public interest" in securing "prompt determinations" of the validity of lower court precedent that might have binding effect in cases beyond the one at hand.[25] Where a district court simply has granted a preliminary injunction—or for that matter a temporary restraining order[26]—barring enforcement of a statute as applied to certain individuals, the precedential effect is far more obscure. Such orders are based on a case-specific balancing of the equities that may well not carry over into other situations. It is simply too burdensome for this Court to bear mandatory direct jurisdiction over every preliminary injunction, temporary restraining order, and other pretrial order in cases potentially implicating the constitutionality of federal statutes. The Court might respond that § 1252 appeals in this context can be limited to preliminary relief having nationwide impact, but this would be bootstrap reasoning without support in our precedents: the propriety of an appeal under § 1252 turns not on the scope of the potential

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24 See, *e.g.*, *EEOC v. Wyoming*, 460 U.S. 226, 229 (1983); *California v. Grace Brethren Church*, 457 U.S. 393, 404-407 (1982); *United States v. Lee*, 455 U.S. 252, 256 (1982); *United States v. Darsmont*, 449 U.S. 292, 293 (1981) (per curiam).

25 *Fleming v. Rhodes*, 331 U.S. at 104.

26 Temporary restraining orders generally cannot be granted absent a showing of reasonable probability of eventual success on the merits although, as in preliminary-injunction cases, the degree of required probability may vary depending on the extent of irreparable injury and the balance of hardships. See 11 Wright, Miller, & Cooper § 2951, at 507-510. The Court's reasoning therefore extends without apparent limitation to all temporary restraining orders issued in litigation challenging the constitutionality of federal statutes.

impact, but on the underlying nature of the district court's determination."[27]

The Court's reasoning sweeps too broadly because there are means other than an expansive reading of § 1252 to ensure that improvident district court injunctions based on "likelihood of success" do not impede the effective functioning of the Federal Government. As Congress has emphasized, "[s]wift judicial review can be had in cases where the public interest requires it" through means short of mandatory appeals jurisdiction.[28] Pursuant to 28 U.S.C. § 1292(a), for example, the courts of appeals may promptly review district court orders granting or denying preliminary injunctions. Courts of appeals routinely supervise the trial-court injunctive process and are therefore in a far superior position to pass initially on questions of irreparable injury, balance of hardships, and abuse of discretion.[29] Moreover, if the question whether a

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[27] Congress did not enact an open-ended 'impact' test for determining which cases should come to this Court for direct review. Although remedial aspects of a case are important, the touchstone of direct appeal under § 1252 is not a party's or our own judgment of the significance of a decision. We exercise that judgment under our discretion to grant certiorari in any civil or criminal case before, as well as after, rendition of judgment. 28 U.S.C. § 1254(1); this Court's Rule 18. In § 1252, Congress mandated direct review not simply for decisions with impact, but rather for decisions whose impact was predicated upon" a lower-court holding that an Act of Congress is unconstitutional. *Heckler v. Edwards*, 465 U.S., at 884.

There is an additional reason why today's jurisdictional decision will bring every order granting preliminary relief in single as-applied cases directly before the Court: jurisdictional rules must be clear cut and cannot turn on indefinite notions of "importance" or "wide-ranging impact." "[L]itigants ought to be able to apply a clear test to determine whether, as an exception to the general rule of appellate review, they must perfect an appeal directly to the Supreme Court." *Id.*, at 877.

[28] S. Rep. No. 94-204, p. 11 (1975). This Report pertained to Congress' repeal of the three-judge district court provisions of 28 U.S.C. § 2282 (1970 ed.), discussed *infra*, at 351-354, and nn. 32-35.

[29] See generally 7 J. Moore, J. Lucas, & K. Sinclair, Moore's Federal Practice, ch. 65 (1985); 11 Wright, Miller, & Cooper §§ 2947-2950.

district court abused its discretion in issuing preliminary relief "is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court," this Court's Rule 18, certiorari review can be obtained before the court of appeals renders judgment. See 28 U.S.C. § 2101(e). This Court has not hesitated to exercise this power of swift intervention in cases of extraordinary constitutional moment and in cases demanding prompt resolution for other reasons.[30] Under this procedure, the Court has discretion to limit immediate review to exceptional cases and to leave initial review of most matters in the courts of appeals which of course "recognize the vital importance of the time element" in constitutional challenges involving the granting or denial of interlocutory relief.[31] Under today's construction of § 1252, however, the Court has no such discretion and accordingly has, I respectfully submit, expanded its mandatory docket to matters that we have no business resolving in the first instance.

One final consideration, based on the history of § 1252 and related provisions, sheds further light on the fallacy of the Court's jurisdictional reasoning. Section 1252 originally was enacted as § 2 of the Judiciary Act of 1937, 50 Stat. 752. Section 3 of that Act created the since-repealed three-judge district court provisions of 28 U.S.C. §§ 2282 (1970 ed.). Section 3 provided that "[n]o interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress" in cases challenging the constitutionality of the Act

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30 See, *e.g.*, *United States v. Nixon*, 418 U.S. 683, 686-687 (1974) (certiorari granted before judgment by the Court of Appeals "because of the public importance of the issues presented and the need for their prompt resolution"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Mine Workers*, 330 U.S. 258 (1947); *Ex parte Quirin*, 317 U.S. 1 (1942); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935); *United States v. Bankers Trust Co.*, decided together with *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240 (1935).

31 *Aaron v. Cooper*, 357 U.S. 566, 567 (1958); see also *Cooper v. Aaron*, 358 U.S. 1, 13 (1958).

could be granted unless presented to and resolved by a three-judge district court. That section also contained its own built-in jurisdictional authorization for direct Supreme Court review of any "order, decree, or judgment" issued by such a court granting or denying "an interlocutory or permanent injunction in such case." Moreover, § 3 provided that a single district judge could enter a "temporary stay or suspension, in whole or in part," of the enforcement of the challenged statute "until decision upon the application," provided that the applicant made a sufficient showing of, *inter alia*, "irreparable loss or damage."[32]

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32 Section 3 provided in full:

"No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as a district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. When any such application is presented to a judge, he shall immediately request the senior circuit judge (or in his absence, the presiding circuit judge) of the circuit in which such district court is located to designate two other judges to participate in hearing and determining such application. It shall be the duty of the senior circuit judge or the presiding circuit judge, as the case may be, to designate immediately two other judges from such circuit for such purpose, and it shall be the duty of the judges so designated to participate in such hearing and determination. Such application shall not be heard or determined before at least five days' notice of the hearing has been given to the Attorney General and to such other persons as may be defendants in the suit: Provided, That if of opinion that irreparable loss or damage would result to the petitioner unless a temporary restraining order is granted, the judge to whom the application is made may grant such temporary restraining order at any time before the hearing and determination of the application, but such temporary restraining order shall remain in force only until such hearing and determination upon notice as aforesaid, and such temporary restraining order shall contain a specific finding, based upon evidence submitted to the court making the order and identified by reference thereto, that such irreparable loss or damage would result to the petitioner and specifying the nature of the loss or damage. The said court may, at the time of hearing such application, upon a like finding,

The history of § 3 is relevant to the instant question in two respects. First, this Court has held flatly that temporary relief granted by a single district judge pending the convening of a three-judge court is reviewable in the first instance by the courts of appeals and not on direct appeal to this Court. See, *e.g., Hicks v. Pleasure House, Inc.*, 404 U.S. 1, 3 (1971) (*per curiam*) (preliminary relief "issued pursuant to [28 U.S.C. § 2284(3) is reviewable in a court of appeals to the extent that any such order is reviewable under 28 U.S.C. §§ 1291 and 1292(a)").[33] It would have made no sense to channel appeals of such orders under § 3 to the courts of appeals while channeling appeals of *identical* preliminary orders in cases that might ultimately fall within § 2 to this Court in the first instance.

Second, when Congress repealed § 2282 in 1976[34] it specifically considered the question of the best means for policing the injunctive process in constitutional challenges pending decision on the underlying merits. Whereas review of three-

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continue the temporary stay or suspension, in whole or in part, until decision upon the application. The hearing upon any such application for an interlocutory or permanent injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day. An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law."

[33] Title 28 U.S.C. § 2284(3) derives in part from the portions of § 3 discussed above in text, and provides that a district judge may grant a temporary restraining order pending hearing and disposition of the underlying merits by a three-judge district court.

[34] See Pub. L. 94-381, § 2, 90 Stat. 1119.

judge interlocutory orders in such cases formerly had been routed directly to this Court, see §§ 2282, 2283 (1970 ed.), Congress believed that interlocutory review in the courts of appeals pursuant to §§ 1291 and 1292(a) would be most consistent with sound judicial administration.

> "One other concern of the committee was the review of the granting, or the denial, of a stay of an injunction by a district court. The committee believes that with appeals of these cases clearly vested in the 11 Circuit Courts of Appeal, they will be more able than the Supreme Court to carefully consider and evaluate requests for a stay in these cases and that ample procedures exist to act effectively in these cases. See, 3 *Barron and Holtzoff* (Wright ed.) § 1371-78." S. Rep. No. 94-204, p. 11 (1975).[35]

Congress thereby indicated its firm intention to leave monitoring of the equitable injunctive process to the courts of appeals in the first instance, and to reserve mandatory direct Supreme Court review for those cases in which this Court properly could resolve the underlying merits of the constitutional challenges themselves.[36]

II

Although deciding that a direct appeal of this preliminary injunction is proper, the six Members of today's majority appear to be sharply divided over the nature of the issues before us and the proper scope of our authority on review.

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[35] The reference is to 3 W. Barron & A. Holtzoff, Federal Practice and Procedure §§ 1371-1378 (1958), which discusses, *inter alia*, the standards for staying district court orders pending appeals.

[36] Because Congress repealed the three-judge district court requirement for cases such as this and "clearly vested" review of interlocutory matters in such cases in the courts of appeals, S. Rep. No. 94-204, p. 11 (1975), the Court's reliance on precedent respecting appeals of three-judge interlocutory orders obviously is misplaced. See *ante*, at 319, citing *Goldstein v. Cox*, 396 U.S. 471, 476 (1970).

JUSTICE O'CONNOR, joined by JUSTICE BLACKMUN, eschews any attempt to resolve the underlying merits of the constitutional challenge. She properly recognizes that, because "[t]he merits of these claims are difficult to evaluate on the record of affidavits and depositions developed at the preliminary injunction stage," it would be improper to express any views on the merits of the appellees' as-applied challenges. *Ante*, at 338 (concurring opinion). Nor, properly, does JUSTICE O'CONNOR purport to determine the facial validity of the challenged statutes, given that the District Court has never reached a fully consummated determination on that question. Instead, she simply observes that "the record falls short of establishing any *likelihood* of such sweeping facial invalidity." *Ante*, at 337 (emphasis added). JUSTICE O'CONNOR accordingly limits her analysis to application of the abuse-of-discretion standard that governs review of preliminary-injunction orders, concluding that "the District Court abused its discretion in issuing a nationwide preliminary injunction." *Ante*, at 336. Although I find this approach far preferable to that taken by the opinion for the Court, I respectfully submit that it is inconsistent with § 1252 for two reasons: First, as set forth above, application of the abuse-of-discretion standard to the equitable process of granting preliminary relief is not subsumed in § 1252 and properly is left to the courts of appeals in the first instance. Second, this approach, by properly avoiding the ultimate resolution of the facial and as-applied constitutional challenges, has not in the slightest way furthered the underlying purpose of § 1252—ensuring the prompt and dispositive resolution of the merits of facial and as-applied constitutional challenges to federal statutes.[37]

The opinion for the Court appears to take a very different tack. To be sure, the Court notes two or three times that the District Court simply found a "likelihood" that the appellees

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[37] If I read the various opinions in this case correctly, it appears that a majority of the Court—JUSTICES O'CONNOR and BLACKMUN in their concurring opinion, and the three justices in dissent—has *not* determined that 38 U.S.C. §§ 3404 and 3405 are constitutional either facially or as applied to particular categories of claims.

after a full trial would be able to demonstrate the unconstitutionality of the challenged statutes, and it states once in passing that the District Court "abused its discretion" in so finding. *Ante*, at 312-313, 315, 334. But that is not the essence of the Court's approach. The Court repeatedly seeks to cast doubt on the bona fides of the District Court's entry of preliminary relief pursuant to Rule 65 by describing that relief in quotation marks: the District Court did not really grant a preliminary injunction, but a "preliminary injunction." *Ante*, at 308, 312, 316. Having thus suggested that the matter is one of "semantic[s]" making "little difference," *ante*, at 317, the Court proceeds to assert, repeatedly, that the District Court actually "*held* that [the $10] limit violates the Due Process Clause of the Fifth Amendment, and the First Amendment," *ante*, at 307 (emphasis added).[38] Having thus mischaracterized the District Court's decision, the Court then purports "to decide this case on the merits," *ante*, at 312, n. 5—bootstrapping its way past the rule that we may "intimate no view as to the ultimate merits" in preliminary-injunction cases[39] by observing that, under § 1252, "it was the *constitutional question* that Congress wished this Court to decide," *ante*, at 318 (emphasis added).

Having thus paved the way for its consideration of the constitutional merits, the Court then proceeds to "review" the District Court's "holding" in light of the record evidence and the three-part *Mathews v. Eldridge*, 424 U.S. 319 (1976), balancing test. The Court focuses on the *Mathews* factors of the risk of an erroneous decision through the current procedures and the probable value of additional safeguards. The Court rummages through the partially developed record and seizes upon scattered evidence introduced by the Government on the eve of the preliminary-injunction hearing—evidence that never has been tested in a trial on the merits—and pronounces that evidence "reliable" and compelling. See, *e.g.*, *ante*, at 331.[40]

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38 See also *ante*, at 312-313, 326, 334.

39 *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 934 (1975).

40 See also *ante*, at 327-330, 330-331, n. 12.

Moreover, the Court excoriates the appellees and the District Court repeatedly for failing to muster sufficient evidence to support the "holding" of unconstitutionality: the appellees made "no such" sufficient presentation of evidence, introduced "nothing" to support the "holding," and "failed to make the very difficult factual showing" necessary to support the "holding" of unconstitutionality. *Ante*, at 326, 329, 330.[41] The conclusion is preordained: the statutes give the appellees "an opportunity under the present claims process" to "make a meaningful presentation" without an attorney's assistance, and the District Court's "holding" of unconstitutionality must therefore be reversed. *Ante*, at 335.

This brand of constitutional adjudication is extraordinary. Whereas JUSTICE O'CONNOR faithfully adheres to the limited role of appellate judges in reviewing preliminary injunctions and thereby departs from the purposes of § 1252, the opinion for the Court seizes upon the underlying purposes of § 1252 in order to evade the well-established rule prohibiting appellate courts from even purporting to "intimate ... view[s]" on the ultimate merits when reviewing preliminary injunctions granted on likelihood of success. *Doran v. Salem Inn, Inc.*, 422 U.S., at 934. If the opinion for the Court turns out to be more than an unfortunate aberration, it will threaten a fundamental transformation of the equitable process of granting preliminary relief in cases challenging the constitutionality of Government action.[42] Individual litigants seeking such relief on grounds of irreparable injury and a balancing of hardships will essentially be required to confront the Government with

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41 See also *ante*, at 314, and n. 6, 324, n. 11, 327-334.

42 The Court's jurisdictional reasoning would also appear to implicate the process of reviewing federal-court preliminary relief in cases challenging the constitutionality of state statutes and state-court preliminary relief in cases challenging the constitutionality of federal statutes. See 28 U.S.C. § 1254(2) (granting mandatory appeals jurisdiction to this Court where "a State statute [is] held by a court of appeals to be invalid as repugnant to the Constitution, treaties, or laws of the United States"); § 1257(1) (granting mandatory appeals jurisdiction over final state-court judgments and decrees where "the decision is against [the] validity" of a federal treaty or statute).

both hands tied behind their backs: if they successfully obtain such relief, this Court will immediately intervene pursuant to § 1252 to review the "holding" of unconstitutionality, will make *de novo* findings that selected evidence is "reliable," will castigate the individuals for failing to adduce sufficient evidence to support the "merits" of the "holding," and will issue a ringing proclamation that the challenged statute is constitutional.

III

I believe that § 1252 should have been construed to permit a direct appeal to this Court only from a lower court decision that represents a fully consummated determination that an Act of Congress is unconstitutional so as to permit this Court properly to resolve the constitutional question on the merits. Unlike JUSTICE O'CONNOR, I do not believe that § 1252 requires this Court directly to police the injunctive process in constitutional challenges in the first instance. Unlike the opinion for the Court, I do not believe that § 1252 may be invoked in such cases to short-circuit the process of orderly and principled constitutional adjudication. Accordingly, I believe the Court should have vacated the judgment and remanded to the District Court for the entry of a fresh decree, so that the Government could take a proper appeal of the preliminary-injunction order to the Court of Appeals for the Ninth Circuit. See, *e.g.*, *United States v. Christian Echoes National Ministry*, 404 U.S. 561, 566 (1972) (*per curiam*). The Court having decided to the contrary and having reached the merits, I join JUSTICE STEVENS' dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The Court does not appreciate the value of individual liberty. It may well be true that in the vast majority of cases a veteran does not need to employ a lawyer, *ante*, at 329-330, and that the system of processing veterans benefit claims, by and large, functions fairly and effectively without the participation of retained counsel. *Ante*, at 327. Everyone agrees, however, that there are at least some complicated cases in which

the services of a lawyer would be useful to the veteran and, indeed, would simplify the work of the agency by helping to organize the relevant facts and to identify the controlling issues. *Ante*, at 328, 329. What is the reason for denying the veteran the right to counsel of his choice in such cases? The Court gives us two answers: First, the paternalistic interest in protecting the veteran from the consequences of his own improvidence, *ante*, at 323; and second, the bureaucratic interest in minimizing the cost of administering the benefit program. *Ante*, at 323-325. I agree that both interests are legitimate, but neither provides an adequate justification for the restraint on liberty imposed by the $10-fee limitation.

To explain my disagreement with the Court, I shall first add a few words about the history of the fee limitation, then identify the flaws in the Court's analysis, and finally explain why I believe § 3404(c) and § 3405 impose an unconstitutional restraint on individual liberty.

I

The first fee limitation—$5 per claim—was enacted in 1862.[1] That limitation was repealed two years later and re-

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[1] Sections 6 and 7 of the Act of July 14, 1862, which authorized a grant of pensions to certain military personnel, provided as follows:

"Sec. 6. *And be it further enacted*, That the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty, and other allowance, before the Pension Office under this act, shall not exceed the following rates: For making out and causing to be duly executed a declaration by the applicant, with the necessary affidavits, and forwarding the same to the Pension Office, with the requisite correspondence, five dollars. In cases wherein additional testimony is required by the Commissioner of Pensions, for each affidavit so required and executed and forwarded (except the affidavits of surgeons, for which such agents and attorneys shall not be entitled to any fees,) one dollar and fifty cents.

"Sec. 7. *And be it further enacted*, That any agent or attorney who shall, directly or indirectly, demand or receive any greater compensation for his services under this act than is prescribed in the preceding section of this act, or who shall contract or agree to prosecute any claim for a pension, bounty,

placed by the $10-fee limitation, which has survived ever since.[2] The limitation was designed to protect the veteran from extortion or improvident bargains with unscrupulous lawyers.[3] Obviously, it was believed that the number of scoundrels practicing law was large enough to justify a legislative prohibition against charging excessive fees.

At the time the $10-fee limitation was enacted, Congress presumably considered that fee reasonable. The legal work involved in preparing a veteran's claim consisted of little more than filling out an appropriate form, and, in terms of the aver-

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or other allowance under this act, on the condition that he shall receive a per centum upon, or any portion of the amount of such claim, or who shall wrongfully withhold from a pensioner or other claimant the whole or any part of the pension or claim allowed and due to such pensioner or claimant, shall be deemed guilty of a high misdemeanor, and upon conviction thereof shall, for every such offence, be fined not exceeding three hundred dollars, or imprisoned at hard labor not exceeding two years, or both, according to the circumstances and aggravations of the offence." 12 Stat. 568.

2 On July 4, 1864, Congress repealed the sixth and seventh sections of the 1862 Act, and substituted the following sections which raised the maximum fee to $10:

"Sec. 12. *And be it further enacted*, That the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty, and other allowance before the pension office, under this act, shall not exceed the following rates: For making out and causing to be duly executed a declaration by the applicant, with the necessary affidavits, and forwarding the same to the pension-office, with the requisite correspondence, ten dollars; which sum shall be received by such agent or attorney in full for all services in obtaining such pension, and shall not be demanded or received in whole or in part until such pension shall be obtained; and the sixth and seventh sections of an act entitled 'An act to grant pensions,' approved July fourteenth, eighteen hundred and sixty-two, are hereby repealed." 13 Stat. 389.

Section 13 of the 1864 Act reenacted the criminal penalties contained in § 7 of the 1862 Act. *Ibid.* See n. 1, *supra*.

3 See Cong. Globe, 37th Cong., 2d Sess., 2101, 3119 (1862); Cong. Globe, 41st Cong., 2d Sess., 1967, 4459 (1870). See also *Calhoun v. Massie*, 253 U.S. 170, 173 (1920).

age serviceman's base pay, a $10 fee then was roughly the equivalent of a $580 fee today.[4] At its inception, therefore, the fee limitation had neither the purpose nor the effect of precluding the employment of reputable counsel by veterans. Indeed, the statute then, as now, expressly contemplated that claims for veterans benefits could be processed by "agents or attorneys."[5]

The fact that the statute was aimed at unscrupulous attorneys is confirmed by the provision for criminal penalties. Instead of just making an agreement to pay a greater fee unenforceable—as an anticipatory pledge of an interest in future pension benefits is unenforceable—the Act contains a flat prohibition against the direct or indirect collection of a greater fee, and provides that an attorney who charges more than $10 may be imprisoned for up to two years at hard labor.[6] Thus, an unscrupulous moneylender or merchant who might try to take advantage of an improvident veteran might have difficulty collecting his bill, but the unscrupulous lawyer might go to jail.

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4 The base pay for all military personnel averaged $231 annually in 1865. U.S. Dept. of Commerce, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, Part I, p. 175 (1975). By contrast, military base pay for all personnel averaged $13,400 in 1984. See U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 1985, p. 345.

5 Today, of course, the procedures are more elaborate than they were in 1864, and the number of claims presenting complex issues of law or fact has greatly increased. It is no longer true that the attorney would seldom, if ever, be asked to do more than fill out a simple form.

6 Recently, we noted the effect of criminal sanctions on constitutional analysis:

"The restriction involved here is not merely an effort by the Government to regulate the use of its own property, such as was involved in *United States Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114 (1981), or the dismissal of a speaker from Government employment, such as was involved in *Connick v. Myers*, 461 U.S. 138 (1983). It is a flat, across-the-board criminal sanction ..." *FEC v. National Conservative PAC*, 470 U.S. 480, 496 (1985).

The language in § 3405, particularly the use of the words "directly or indirectly," apparently would apply to consultations between a veteran and a lawyer concerning a claim that is ultimately allowed, as well as to an appearance before the agency itself. In today's market, the reasonable fee for even the briefest conference would surely exceed $10. Thus, the law that was enacted in 1864 to protect veterans from unscrupulous lawyers—those who charge excessive fees—effectively denies today's veteran access to *all* lawyers who charge reasonable fees for their services.[7]

II

The Court's opinion blends its discussion of the paternalistic interest in protecting veterans from unscrupulous lawyers and the bureaucratic interest in minimizing the cost of administration in a way that implies that each interest reinforces the other. Actually the two interests are quite different and merit separate analysis.

In my opinion, the bureaucratic interest in minimizing the cost of administration is nothing but a red herring.[8] Congress has not prohibited lawyers from participating in the processing of claims for benefits and there is no reason why it

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[7] In its Report on S. 349 in the 97th Congress, the Veterans' Administration stated:

"It is probably true that, except for those whose low income qualifies them for free legal services, the current fee limitation effectively precludes attorney representation before the VA." S. Rep. No. 97-466, p. 102 (1982) (letter of Veterans' Administration's Acting Director to Hon. Alan K. Simpson, dated July 14, 1981).

[8] Section 401 of a bill approved unanimously by the Senate Committee on Veterans' Affairs would have removed the $10-fee limitation for services rendered in representing a claimant following an initial decision of the Board of Veterans' Appeals. The Committee Report stated: "Enactment of the provisions in Section 401 are estimated to entail no cost." *Id.*, at 79.

should.[9] The complexity of the agency procedures can be regulated by limiting the number of hearings, the time for argument, the length of written submissions, and in other ways, but there is no reason to believe that the *agency's* cost of administration will be increased because a claimant is represented by counsel instead of appearing *pro se*.[10] The informality that the Court emphasizes is desirable because it no doubt enables many veterans, or their lay representatives, to handle their claims without the assistance of counsel. But there is no reason to assume that lawyers would add confusion rather than clarity to the proceedings. As a profession, lawyers are skilled communicators dedicated to the service of their clients. Only if it is assumed that the average lawyer is incompetent or unscrupulous can one rationally conclude that the efficiency of the agency's work would be undermined by allowing counsel to participate whenever a veteran is willing to pay for his services. I categorically reject any such assumption.

The fact that a lawyer's services are unnecessary in most cases, and might even be counterproductive in a few, does not justify a total prohibition on their participation in all pension claim proceedings. This fact is perhaps best illustrated by *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), a case in which we held that the State does not have a constitutional obligation to pro-

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9 The Court's entire discussion of the bureaucratic interest is based on the assumption that the removal of the fee limitation constitutes a "proposed additional procedure." See *ante*, at 327. It would be more accurate to state that the proposal would permit more qualified spokesmen to participate in the existing procedure.

10 The District Court unequivocally found that, apart from the paternalistic interest, the Government would not be harmed in the slightest by lifting the fee limitation. The District Court wrote:

"The government has neither argued nor shown that lifting the fee limit would harm the government in any way, except as the paternalistic protector of claimants' supposed best interests." 589 F. Supp. 1302, 1323 (ND Cal. 1984).

See also n. 8, *supra*.

vide a parolee or probationer with counsel in every revocation proceeding. The informality of the proceeding makes counsel unnecessary in most cases, but we squarely held that in some cases a lawyer's presence was constitutionally required.[11] Although, surprisingly, the Court relies on *Gagnon* today, see *ante*, at 324-325, not a word in that opinion implies that a parolee or probationer could be denied the right to have retained counsel represent him. The case-by-case approach to the participation of counsel endorsed in *Gagnon*[12] is the approach that should apply to veterans claim proceedings. Lawyers may not be needed in most cases, but should be permitted in appropriate cases.[13] The interest in efficient administration plainly does not justify a total prohibition on representation by counsel. Nor can it justify a rule that indirectly ac-

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11 We stated:

"We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees." 411 U.S., at 790.

12 As we expressly noted:

"The need for counsel at revocation hearings derives, not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases." *Id.*, at 789.

13 In *FEC v. National Conservative PAC*, 470 U.S., at 493, the Court noted that "allowing the presentation of views while forbidding the expenditure of more than $1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system." By analogy, allowing the presentation of views by a *pro se* claimant while forbidding the expenditure of more than $10 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system.

complishes that result by discouraging their participation in all cases.

The paternalistic interest in protecting the veteran from his own improvidence would unquestionably justify a rule that simply prevented lawyers from overcharging their clients. Most appropriately, such a rule might require agency approval, or perhaps judicial review, of counsel fees. It might also establish a reasonable ceiling, subject to exceptions for especially complicated cases. In fact, I assume that the $10-fee limitation was justified by this interest when it was first enacted in 1864. But time has brought changes in the value of the dollar, in the character of the legal profession, in agency procedures, and in the ability of the veteran to proceed without the assistance of counsel.

In 1982, the Senate Committee on Veterans' Affairs reviewed the fee limitation and concluded:

> "As was discussed in the VA's agency report on S. 330 (VA report on S. 330 at pages 16-17 (reprinted at pages 98-99 of S. Rept. No. 96-178)), the basis for Congressional action, first after the Civil War and then after World War I, limiting the amount an attorney could receive for representing a claimant before the VA was grounded in a belief that the lawyers of that day were unscrupulous and were taking unfair advantage of veterans by retaining an unwarranted portion of the veterans' statutory entitlement in return for very limited legal assistance. Whatever the merits of such a view at the time the limitation was imposed, and despite numerous court opinions upholding the validity of the statutory limitation in the face of challenges to its constitutionality (see, e.g., *Gendron v. Saxbe*, 389 F. Supp. 1303 (C.D. Cal.), *aff'd mem. sub nom, Gendron v. Levi*, 423 U.S. 802 (1975); *Staub v. Roudebush*, 574 F. 2d 637 (D.C. Cir. 1978)), *it is the Committee's position that such a view of today's organized bar, particularly in light of the widespread network of local bar associations that now generally police attorney behavior, is no longer tenable.*

"The Committee is also of the view that the current statutory limitation is an undue hindrance on the rights of veterans and other claimants to select representatives of their own choosing to represent them in VA matters. As noted above, there is a strong and vital system of veterans service officers who provide excellent representation at no cost to claimants. The Committee fully expects and believes that this system will continue and prosper, undiminished by the new right of judicial review and opportunity for attorney participation created in this legislation. However, *an individual should not be arbitrarily restricted in retaining an attorney, whether such representation is desired for reasons of personal preference or because of a concern that the claim is likely to be denied a second time by the Board of Veterans' Appeals and will be appealed to court. A claimant could well conclude, for example, that some further development of the administrative record in a complex case would be of critical importance while the matter is still before the agency and that an attorney would be better able to so develop the record."* S. Rep. No. 97-466, pp. 50-51 (1982) (emphasis added).

Moreover, the growth of the strong system of active service officers who provide excellent representation at no cost to claimants is significant because it has virtually eliminated the danger that a claimant will be tempted to waste money on unnecessary legal services. As the Senate Committee recognized, however, the availability of such competent, free representation is not a reason for denying a claimant the right to employ counsel of his own choice in an appropriate case.

III

It is evident from what I have written that I regard the fee limitation as unwise and an insult to the legal profession. It does not follow, however, that it is unconstitutional. The Court correctly notes that the presumption of constitutionality that attaches to every Act of Congress requires the challenger to bear the burden of demonstrating its invalidity. Before attempting to do so, I must comment on two aspects of the

Court's rhetoric: Its references to the age of the statute and to the repudiation of *Lochner v. New York*, 198 U.S. 45 (1905).

The fact that the $10-fee limitation has been on the books since 1864 does not, in my opinion, add any force at all to the presumption of validity. Surely the age of the *de jure* segregation at issue in *Brown v. Board of Education*, 347 U.S. 483 (1954), or the age of the gerrymandered voting districts at issue in *Baker v. Carr*, 369 U.S. 186 (1962), provided no legitimate support for those rules. In this case, the passage of time, instead of providing support for the fee limitation, has effectively eroded the one legitimate justification that formerly made the legislation rational. The age of the statute cuts against, not in favor of, its validity.

It is true that the statute that was incorrectly invalidated in *Lochner* provided protection for a group of workers, but that protection was a response to the assumed disparity in the bargaining power of employers and employees, and was justified by the interest in protecting the health and welfare of the protected group. It is rather misleading to imply that a rejection of the *Lochner* holding is an endorsement of rational paternalism as a legitimate legislative goal. See *ante*, at 323. But in any event, the kind of paternalism reflected in this statute as it operates today is irrational. It purports to protect the veteran who has little or no need for protection, and it actually denies him assistance in cases in which the help of his own lawyer may be of critical importance.[14]

But the statute is unconstitutional for a reason that is more fundamental than its apparent irrationality. What is at stake is

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[14] Justice Brandeis' statement in *Olmstead v. United States*, 277 U.S. 438 (1928), is worth remembering in this context:

"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Id.*, at 479 (Brandeis, J., dissenting).

the right of an individual to consult an attorney of his choice in connection with a controversy with the Government. In my opinion that right is firmly protected by the Due Process Clause of the Fifth Amendment[15] and by the First Amendment.[16]

The Court recognizes that the Veterans' Administration's procedures must provide claimants with due process of law, but then concludes that the constitutional requirement is satisfied because the appellees have not proved that the "probability of error under the present system" is unacceptable.[17] *Ante*, at 326. In short, if 80 or 90 percent of the cases are correctly decided, why worry about those individuals whose claims have been erroneously rejected and who might have prevailed if they had been represented by counsel?

The fundamental error in the Court's analysis is its assumption that the individual's right to employ counsel of his choice in a contest with his sovereign is a kind of second-class interest that can be assigned a material value and balanced on

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15 Cf. *Wright v. Ingold*, 445 F. 2d 109, 111-112 (CA7 1971).

16 Some propositions are so obvious that they seldom need to be stated explicitly. In a series of cases the Court has considered the extent to which the First Amendment protects the lawyer's right to solicit business, finding protection in some situations but not others. Compare *In re Primus*, 436 U.S. 412, 423-426 (1978), with *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978). But in all of those cases it was necessarily assumed that the individual's right to ask for, and to receive, legal advice from the lawyer of his choice was fully protected by the First Amendment. That assumption was explicitly acknowledged by the parties in the *Primus* case and recognized in a footnote to our opinion, 436 U.S., at 426, n. 17 ("There is no doubt that such activity is protected by the First Amendment"). If ordinary communication between attorney and client is so protected, it is doubly important to prevent abridgment of communication in support of an exercise of the right to petition the Government for the redress of a veteran's grievances. See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

17 Indeed, at one point in its opinion the Court seems to take the position that there is no constitutional defect unless "the entire system is operated contrary to its governing regulations." *Ante*, at 324, n. 11.

a utilitarian scale of costs and benefits.[18] It is true that the veteran's right to benefits is a property right and that in fashioning the procedures for administering the benefit program, the Government may appropriately weigh the value of additional procedural safeguards against their pecuniary costs. It may, for example, properly decide not to provide free counsel to claimants. But we are not considering a procedural right that

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[18] As I explained in protesting the Court's denigration of the right to counsel in proceedings to terminate parental rights:

"The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless." *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 60 (1981) (dissenting).

Moreover, the Framers of the Constitution created a federal sovereign whose powers were to be exercised by different branches—a Legislature, an Executive, and a Judiciary—and which was expected to coexist with at least 13 other sovereigns having jurisdiction over the same people and the same territory. Surely, if they were motivated by a desire to improve the efficiency of the economy, they could have developed a much more simple design for the new Government. The reason they did not do so is perfectly clear. The text of the Constitution is replete with provisions that are intended to secure the blessings of liberty—or conversely, to protect against the dangers of tyranny—notwithstanding their possible costs. Significantly, those protections not only recognized the evils associated with a monarch, or an executive with absolute power, but also the risk of tyranny by an unrestrained majority. The limited delegations of power to the Federal Government, the tripartite division of authority among three branches of the Federal Government, the division of the Legislature into two Houses, the staggered terms of office, with Senators serving six years, the President four years, and Representatives only two, the provision for a Presidential veto of Acts of Congress, the guarantee of life tenure for federal judges—all of the checks and balances are consistent with the interest in protecting individual liberty from the possible misuse of power by a transient unrestrained majority.

would involve any cost to the Government.[19] We are concerned with the individual's right to spend his own money to obtain the advice and assistance of independent counsel in advancing his claim against the Government.[20]

In all criminal proceedings, that right is expressly protected by the Sixth Amendment. As I have indicated, in civil disputes with the Government I believe that right is also protected by the Due Process Clause of the Fifth Amendment and by the First Amendment. If the Government, in the guise of a paternalistic interest in protecting the citizen from his own improvidence, can deny him access to independent counsel of his choice, it can change the character of our free society.[21] Even though a dispute with the sovereign may only involve

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[19] The way the Court utilizes the *Mathews v. Eldridge* procedural-due-process analysis is somewhat misleading. Here, appellees do not seek additional opportunities to be heard, to have counsel appointed at governmental expense, or any type of additional procedure. They simply want to exercise their right to choose, to consult, and to employ the services of legal counsel in order to conduct and manage their personal affairs—a right that should be unfettered in a free society.

[20] See *Munn v. Illinois*, 94 U.S. 113 (1877):

"No State 'shall deprive any person of life, liberty, or property without due process of law,' says the Fourteenth Amendment to the Constitution. ... By the term 'liberty,' as used in the provision, something more is meant than the mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment." *Id.*, at 142 (Field, J., dissenting).

[21] As Justice Jackson recognized in *American Communications Assn. v. Douds*, 339 U.S. 382, 442-443 (1950):

"The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error."

property rights, or as in this case a statutory entitlement, the citizen's right of access to the independent, private bar is itself an aspect of liberty that is of critical importance in our democracy.[22] Just as I disagree with the present Court's crabbed view of the concept of "liberty,"[23] so do I reject its apparent unawareness of the function of the independent lawyer as a guardian of our freedom.[24]

In my view, regardless of the nature of the dispute between the sovereign and the citizen—whether it be a criminal trial, a proceeding to terminate parental rights, a claim for social security benefits, a dispute over welfare benefits, or a pension claim asserted by the widow of a soldier who was killed on the battlefield—the citizen's right to consult an independent lawyer and to retain that lawyer to speak on his or her

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22 The Solicitor General cavalierly states that "[n]othing in the First Amendment suggests that the fee limitation is unconstitutional because it restricts a claimant in hiring a private lawyer where other, adequate representation is available without charge." Brief for Appellants 47. This statement misses a principle so plain and fundamental that I would think it would not need to be stated: Every citizen in this country is presumed to be unrestricted in consulting or employing an attorney on any matter, or in making the decision that legal representation for any purpose is not needed. As to this proposition, it makes no difference whether, as the Solicitor General claims, "the existing VA claims procedure is fair and adequate without privately retained attorneys," *ibid.*, a conclusion that the District Court rejected. The statute, moreover, on the one hand, recognizes and allows legal representation, but on the other hand restricts the veteran's right to choose and to consult a legal representative in any meaningful manner, thus virtually reducing the right to counsel to nonexistence.

23 Compare *Meachum v. Fano*, 427 U.S. 215, 225-226 (1976), with *id.*, at 230 (STEVENS, J., dissenting).

24 That function was, however, well understood by Jack Cade and his followers, characters who are often forgotten and whose most famous line is often misunderstood. Dick's statement ("The first thing we do, let's kill all the lawyers") was spoken by a rebel, not a friend of liberty. See W. Shakespeare, King Henry VI, pt. II, Act IV, scene 2, line 72. As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government.

behalf is an aspect of liberty that is priceless. It should not be bargained away on the notion that a totalitarian appraisal of the mass of claims processed by the Veterans' Administration does not identify an especially high probability of error.[25]

Unfortunately, the reason for the Court's mistake today is all too obvious. It does not appreciate the value of individual liberty.

I respectfully dissent.

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[25] According to the Court, "process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them." *Ante*, at 330.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; Swords to Plowshares Veterans Rights Organization, a California non-profit corporation; Don E. Cordray, an individual; Albert R. Maxwell, an individual; Reason F. Warehime, an individual; Doris J. Wilson, an individual, Plaintiffs.

v.

Harry N. WALTERS, Administrator of The Veterans Administration; the United States of America; the Veterans Administration; Paul D. Ising, Director, San Francisco Regional Office, the Veterans Administration, Defendants.

NO. C–83–1861–MHP.

United States District Court,

N.D. California

May 7, 1986.

James T. Garrett, Gordon P. Erspamer, Michael F. Ram, Morrison & Foerster, San Francisco, Cal., for plaintiffs.

George Christopher Stoll, Asst. U.S. Atty., San Francisco, Cal., Edward J. Luke, Deputy Asst. Gen. Counsel, Veterans Dept., Washington, D.C., Jack Nagan, Office of Dist. Counsel, Veterans Admin., San Francisco, Cal., for defendants.

PATEL, District Judge.

This action is before the court on plaintiffs' motion for class certification. For the reasons discussed below, the court concludes that plaintiffs have made a sufficient showing to justify conditional certification of the proposed class.

PROCEDURAL HISTORY

This action was originally filed by two veterans' organizations and four individuals challenging the constitutionality of 38 U.S.C. §§ 3404 and 3405, which impose a $10.00 fee limit for all work performed by an attorney in representing a veteran pursuing Service-Connected Death and Disability ("SCDD")

claims before the Veterans Administration ("VA"). Plaintiffs alleged that the fee limitation effectively precluded them from obtaining counsel, thereby depriving them of their right to procedural due process under the Fifth Amendment and their First Amendment rights to petition the government for redress of grievances and to associate freely. Plaintiffs challenged the fee limitation both "on its face" and "as applied" to them.

On June 12, 1984, this court granted plaintiffs' motion for a preliminary injunction, finding that plaintiffs had demonstrated a high likelihood that they would prevail on both their due process and First Amendment claims, and that they would suffer irreparable injury if the injunction was not granted. *National Association of Radiation Survivors v. Walters*, 589 F. Supp. 1302 (N.D.Cal. 1984).

On June 28, 1985 the Supreme Court, in four separate opinions, reversed this court's preliminary injunction order. *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985). A majority of the Court held that the fee limitation was not unconstitutional on its face and that a nationwide injunction granting "categorical relief" was therefor inappropriate. Justice O'Connor, in a concurring opinion, made clear her understanding that the Court was not determining the merits of plaintiffs' "as applied" claims and that "the claims of any individuals or identifiable groups . . . remain open on remand." 105 S.Ct. at 3197. With respect to the claims of any "identifiable groups," Justice O'Connor suggested that plaintiffs could prevail if they could demonstrate the existence of a "subclass of complex claims that by their nature require expert assistance beyond the capabilities of service representatives to assure the veterans '"[a] hearing appropriate to the nature of the case."'" 105 S.Ct. at 3198 (citations omitted). Justice O'Connor noted, however, that plaintiffs' claims had not been framed as a class action and that this court's findings and relief were not narrowly drawn to reach only a discrete class of complex cases. Thus, Justice O'Connor concluded, "[i]n its present posture, this case affords no sound basis for carving out" a subclass of complex

cases with respect to which application of the fee limitation might be unconstitutional. *Id.*

Following the Supreme Court's decision, plaintiffs amended their First Amended complaint to add a class claim on behalf of all "Ionizing Radiation Claimants." Defendants moved to dismiss plaintiffs' Second Amended Complaint, arguing that the Supreme Court had rejected plaintiffs' constitutional claims on their merits. On June 22, 1986, this court granted defendants' motion with respect to plaintiffs' facial challenge, but denied the motion with respect to the "as applied" claims.

Plaintiffs now move for certification of the following class:

> All persons who currently have pending or who file or re-open VA service-connected death and disability compensation 1 ("SCCD") claims based on exposure to nuclear radiation from government atomic bomb tests in the Marshall Islands or the Nevada Test Site or from the atomic bombs dropped on Hiroshima and Nagasaki in 1945 ("Ionizing Radiation Claims"). The class also includes all persons who are receiving or receive SCDD for an Ionizing Radiation Claim but: (1) whose compensation has been reduced or is threatened with reduction, or (2) who have formally contested, or formally contest, the disability rating issued by the VA or the period of retroactive compensation.

(Plaintiffs' Reply at 14-15). In short, the proposed class consists of all past, present and future ionizing radiation claimants who have, or will have, some form of "active" claim relating to SCDD benefits before the VA.

Defendants oppose class certification, contending that plaintiffs' proposed class fails to meet any of the requirements of Rule 23 and is inconsistent with the Supreme Court's decision in this case.

DISCUSSION

Requirements of Rule 23(a)

All motions for class certification must meet the requirements of Rule 23(a), which provides that a class action may be maintained if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

1. Numerosity

Although mere speculation as to the number of class members is not sufficient to satisfy Rule 23(a)(1), *see* 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1762 (1985), "the exact size of the class need not be known so long as 'general knowledge and common sense indicate that it is large.'" *Perez-Funez v. District Director, INS*, 611 F. Supp. 990, 995 (C.D.Cal. 1984) (quoting *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D.Cal. 1982). The outer limits of the class size in this case are relatively certain. According to defendants' figures, approximately 233,000 veterans participated in the government's atomic bomb tests and the occupation of Hiroshima and Nagasaki. thus, the class size is somewhere between 233,000 and 6—the number of named plaintiffs in this action. Although it is impossible to tell precisely where the actual class size falls on this continuum, there is ample reason to believe that it is sufficiently large to meet the requirements of Rule 23(a)(1).

The proposed class in this case includes those ionizing radiation claimants who seek to reopen claims already denied, those with claims currently pending and those who may file claims at some future date, as well as some veterans who are receiving benefits but who believe they are not receiving all the benefits to which they are entitled. 3,875 ionizing radiation

claims have already been decided by the VA and all but 16 of them have been denied. Thus, there are presently 3,859 veterans who may seek to reopen their claims if permitted to retain an attorney for that purpose. If only 1% of these claimants actually seek to reopen their claims, the class would be sufficiently large, without considering pending and future claims. Significantly, pursuant to a settlement agreement reached *Gott v. Walters*, Nos. 82–1148, 82–1159, 82–1454 (D.C.Cir.), an action challenging the VA's ionizing radiation regulations, many of these claimants will soon be personally notified by the VA of their right to seek a reopening of previously denied claims and the procedures they must follow.

Although the precise number of pending claims is not know, defendants conceded at oral argument that the number is substantial. Moreover, as defendants also conceded, they have at their disposal the information necessary to determine the number of pending claims but, to date, have made no attempt to do so. Under these circumstances, defendants can hardly complain that plaintiffs have failed to establish the number of pending claims. *See, e.g., Folsom v. Blum*, 87 F.R.D. 443, 445 (S.D.N.Y. 1980) (rejecting as "pure sophistry" the government's contention that class certification must be denied because plaintiff was unable to state the exact number of persons affected by the challenged practice, noting that the government had the means to identify the affected individuals at will). Furthermore, if in fact neither party can count, let alone identify, those individuals with pending claims, this alone suggests joinder would be impracticable. *See Phillips v. Joint Legislative Committee on Performance and Expenditure Review*, 637 F.2d 1014, 1022 (5th Cir. 1981), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982).

Finally, although there is, of course, no way to determine the number of future claimants, several factors suggest that the number will be quite large. These factors include the recent surge in awareness and political and legal activity in the area of "atomic veterans," the long latency period of many radiation-related diseases, and the fact that there are over 200,000

potential claimants, thousands of whom have already filed claims.

In short, although the precise number of class members is not know, "general knowledge and common sense indicate" that the class is large enough to make joinder impracticable.[1] The court need not rely on class size alone, however. Although the requirement of 23(a)(1) is often referred to as the "numerosity requirement," the true focus of 23(a)(1) is the impracticability of joinder. Thus, in determining whether joinder is impracticable in a particular case, the court should consider not only the class size but other factors as well, including the geographical diversity of class members, the ability of individual members to institute separate suits, and the nature of the underlying action and the relief sought. *See, e.g., Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981); 1 H. Newburg, *Class Actions* § 3.06 (2d ed. 1985); 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1762 (1972).

At defendants' suggestion, plaintiffs included all future ionizing claimants in the proposed class. "[W]here the class includes unnamed, unknown future members, joinder of such unknown individuals in impracticable and the numerosity requirement is therefore met," regardless of class size. *International Molders' and Allied Workers' Local Union No. 164 v.*

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[1] *Nguyen Da Yen v. Kissinger*, 70 F.R.D. 656 (N.D.Cal.1976), *app. dismissed*, 602 F.2d 925 (9thCir.1979), relied on by defendants, is distinguishable. The plaintiffs in *Nguyen Da Yen* were "able to say only that at least a few of the children here as a result of the Vietnamese orphan airlift are similarly situated to the named representatives." *Id.* at 662. The court found no basis on which to estimate the number of class members or even to determine whether the class included more than ten members. As already discussed, based on the figures that *are* available to the court in this case and the nature of both the class composition and the underlying claims, there is good reason to believe that the proposed class is sufficiently large to make joinder impracticable, even though the precise size of the class is unknown. Moreover, as will be discussed below, joinder is impracticable in this case for a number of other reasons which were either not applicable or were not considered by the court in *Nguyen Da Yen*.

Nelson, 102 F.R.D. 457, 461 (N.D.Cal. 1983) (citing *Jack v. American Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974)). *See also Smith v. Heckler*, 595 F. Supp. 1173, 1186 (E.D.Cal. 1984) ("Joinder in the class of persons who may be injured in the future has been held impracticable, without regard to the number of persons already injured"); *Ellis v. Naval Air Rework Facility*, 404 F. Supp. 391, 396 (N.D.Cal. 1975) ("Since there is no way now of determining how many of these future plaintiffs there may be, their joinder is impracticable").

The nature of the action and the relief sought also support a finding that the requirements of Rule 23(a)(1) have been met. Plaintiffs challenge the fee limitation on constitutional grounds and seek both injunctive and declaratory relief. As one commentator has noted, "class actions challenging statutes or administrative procedures on constitutional grounds, have been recognized as natural class actions, and inclusion in the class of potentially aggrieved individuals has often been regarded as sufficient to meet the Rule 23(a)(1) impracticability requirement." 1 H. Newburg, *Class Actions* § 3.07 (2d ed. 1985). *See also Smith v. Heckler*, 595 F. Supp. at 1186 ("[S]pecial consideration applies to actions seeking declaratory or injunctive relief against conduct that is likely to cause future harm").

Geographical diversity is another relevant consideration. This is a nationwide class action brought on behalf of all ionizing radiation claimants. Because, by definition, all such claimants were serving in the military at the time of their alleged exposure to nuclear radiation, it is reasonable to assume that they are spread out across the United States, thus making joinder less practicable.

Finally, the court notes that many, if not most, of the claimants may well be unable to bring individual suits. The class members are all disabled veterans or their widows. It is unlikely that many of these claimants have the financial resources to mount an individual constitutional challenge to the fee limitation.

Taken together, these factors support a finding that joinder would be impracticable, regardless of the class size. When

considered in conjunction with those factors which suggest the class is, in fact, quite large, it is clear that the requirements of Rule 23(a)(1) have been met.[2]

2. Commonality

In order to meet the commonality requirement of 23(a)(2), plaintiffs must establish that there are questions of law *or* fact common to the class as a whole. Rule 23(a)(2) does not require that all members of the class be identically situated; the requirement is met so long as there are substantial questions of law or fact common to all. *Harris v. Palm Springs Alpine Estates*, 329 F.2d 909, 914 (9th Cir. 1964).

There can be no doubt that there exists a substantial question of law common to all class members: whether the fee limitation, as applied to ionizing radiation claimants, violates the due process clause and the First Amendment by precluding them from retaining counsel in connection with their SCDD claims. In *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974), the plaintiffs brought a class action on behalf of indigent parents who were parties to dependency proceedings alleging that they had a constitutional right to appointed counsel in such proceedings. The Ninth Circuit upheld the district court's finding that the requirements of Rule 23(a)(2) had been met, stating: "The principal question of law is common to all members. All assert a constitutional right to appointed counsel." *Id.* at 943. Here, the class members all assert a constitutional right to retain counsel.

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[2]Defendants contend that there is one subclass—those persons receiving SCDD benefits for ionizing radiation who are either being threatened with reduction or are contesting their disability rating—which clearly fails to meet the numerosity requirement because only 16 such claims have been allowed. Even assuming that these claimants are properly characterized as a "subclass," and that joinder of all 16 would not be impracticable, the proposed class includes not only those who are currently receiving benefits for ionizing radiation but also those who, in the future, receive such benefits. Thus, the class is not limited to 16 members and includes future claimants whose inclusion makes joinder inherently impracticable (see discussion, *infra*).

In addition to this fundamental common issue of law, plaintiffs identify the following common issues of fact:

> (1) the factual complexity of the underlying Ionizing Radiation Claims; (2) the VA's lack of resources to develop or refusal to develop the facts necessary to reestablish Ionizing Radiation Claims; (3) the legal complexity of the VA's ionizing radiation regulations and the considerable judgment involved in applying the law to the facts; (4) the radiogenic nature of the diseases and the lengthy latency periods associated with such diseases; (5) the difficulty of locating and obtaining complete medical records for the claimant's period of service; (6) the almost universal need for expert testimony; (7) the need to refute Defense Nuclear Agency dose reconstructions with testimony from qualified health experts; (8) the inability of service representatives to adequately represent Ionizing Radiation Claimants and claimants' dissatisfaction with the services performed by service representatives; (9) the difficulty of placing veterans at exposure sites due to inadequate DOD record-keeping; (10) obstacles placed by DOD/DNA to make the claims process more difficult, such as the necessity of submitting a FOIA request to obtain a government dose reconstruction; and (11) the existence of physical disabilities that prevent claimants from prosecuting their claims.

(Plaintiffs' Brief at 8-9).

All of these issues relate to the ultimate issue, at the heart of plaintiff's constitutional challenge, whether ionizing radiation claims are, by their very nature, so complex that the assistance of an attorney is necessary to ensure a fair and constitutionally adequate hearing. As such, these factual issues are clearly common to all ionizing radiation claimants, regardless of any variations in the facts or circumstances of each claimant's individual claim *for benefits*. Defendants might ultimately prevail on their argument that ionizing radiation claims are not so inherently complex as to require the assistance of counsel in every case. But this argument goes to the

very merits of plaintiff's constitutional claim—not to the issue of commonality or the propriety of certifying a class action. The cases cited by defendants are clearly distinguishable. *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982), involved a challenge to the conditions in all county jails in all 82 counties in the state. The Fifth Circuit simply upheld the district court's finding that "'the physical and environmental conditions at county jails in the state are so divergent that it is virtually impossible to state with certainty what may be common issues,'" adding that although Rule 23(a)(2) does not require complete identity of legal claims, "it does require that there be at least one issue whose resolution will affect all or a significant number of the putative class members." *Id.* at 335. Here, plaintiffs have identified a host of legal and factual issues whose resolution will affect the putative class members.

In *Love v. Turlington*, 733 F.2d 1562 (11th Cir. 1984), the plaintiffs challenged the state's use of the SSAT-I to create a pool of students "at risk" of not receiving a high school diploma. The Eleventh Circuit held that the district court properly denied certification because the determination of whether a student who failed the test would ultimately be eligible for a diploma was made by individual teachers on the basis of a student's individual achievements and unique situation. Similarly, in *Metcalf v. Edelman*, 64 F.R.D. 407 (N.D. Ill. 1974), the court found no common questions of fact among putative class members challenging the denial of shelter exceptions "since varying circumstances surround the denial of the individual shelter exceptions." *Id.* at 410. In contrast, all ionizing radiation claimants are denied the "right" to retain counsel regardless of their individual circumstances.

Finally, *Cleaver v. Wilcox* actually supports plaintiff's position, not defendants'. The Ninth Circuit in *Cleaver* held that the requirements of Rule 23 had been met and that a class action was therefore appropriate, even though *on the merits* the court held that an indigent parent's right to appointed counsel in a dependency hearing should be decided on a case-by-case basis. The Ninth Circuit's opinion in *Cleaver* serves to highlight defendants' confusion between what plaintiffs must establish

to prevail on the merits of their constitutional challenge and the showing they must make to meet the requirements of Rule 23.

3. Typicality

Rule 23(a)(3) requires that the claims of the representative plaintiffs be typical of the claims of the class. The named plaintiffs in this case are two veterans and four veterans' widows. Both veterans allege that they were exposed to ionizing radiation while in the service and that they are currently suffering from disabilities as a result of this exposure. The four widows allege that their husbands died as a result of exposure to ionizing radiation while in the service. All six plaintiffs have filed SCDD claims which have been denied on the grounds that the injury or death was not caused by service-connected exposure to radiation.[3] All allege that they desired the assistance of counsel and sought to retain counsel but were prevented from doing so by the $10 fee limitation.

The claims of the named plaintiffs are thus typical of the claims of class members who, by definition, are individuals with SCDD claims based on alleged exposure to nuclear radiation while in the service and who are precluded by the $10 fee limitation from hiring an attorney. It is true that the specific facts and circumstances surrounding each of the named plaintiffs' *underlying claim for benefits* differs to some extent from the underlying claims of the other named plaintiffs and other class members. But this is not an action for benefits—it is an action challenging the constitutionality of the fee limitation as applied to all ionizing radiation claimants. With respect to this challenge, the claims of the named plaintiffs are clearly typical of the claims of the class members.

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[3]Although plaintiff Reason Warehime has a service-connected disability rating of 60%, his rating is based on conditions unrelated to radiation exposure and he has been denied service-connection with respect to the alleged effects of his exposure to radiation. Similarly, plaintiff Albert Maxwell currently has a 100% service-connected disability rating but was denied service-connection for his multiple myelomas which he contends were caused by his exposure to radiation.

Nevertheless, defendants contend that none of the named plaintiffs raise claims typical of the class claims. With respect to plaintiff Marthann Connor, defendants note that although her claim was originally denied, on March 25, 1986 the VA awarded Connor the benefits she sought. Therefore, defendants argue, her claim is not typical and she lacks standing to bring this action. Even assuming that the timing of the VA's change of position (two and one-half years after the initial claim was brought and only six days before defendants filed their opposition to class certification) was purely coincidental, Connor contests her period of retroactivity and thus is both a member of the class and continues to have an economic interest in this action.

With respect to the other five named plaintiffs, defendants contend their claims are not typical because, in each instance, the veteran either was not exposed to radiation while in the service or did not die or become disabled as a result of such exposure. Since the six veterans were not injured as a result of exposure to radiation while in the service, defendants argue, their claims are not typical of the claims of class members who *did* suffer injury or death from service-connected radiation exposure.

Defendants' argument is nothing more than blatant bootstrapping. In essence, defendants argue that the named plaintiffs' claims are not "typical" because the plaintiffs failed to prevail on their claim for benefits before the VA. But, of course, the whole point of this litigation is that plaintiffs contend they need the assistance of counsel in order to adequately prove their claims. The fact that the VA concluded they were not disabled as a result of service-connected radiation exposure neither establishes, for purposes of this litigation, that they in fact suffered no such injury nor renders their claims atypical.

Furthermore, under defendants' argument, none could ever have claims typical of the class, even if all the claims of all class members were identical: if a claimant like Connor prevails on her claim for benefits, defendants contend her claim is not typical and she lacks standing to sue; if, on the other hand,

the claimant fails to prevail this, defendants argue, similarly renders the claim atypical. Thus defendants present plaintiffs with the proverbial "Catch-22." It won't work. Moreover, defendants' argument ignores the fact that it is the legal and factual claims raised in *this litigation*, not in the plaintiffs' underlying claims for benefits, that must be "typical."

If defendants' argument was only lacking in cogency that would be one matter; however, in at least one respect, it lacks honesty as well. In their opposition brief, defendants assert that Stanley Wilson's death "was caused by his long-term alcoholism." The declaration of Robert Warner, a staff attorney for the VA, states that although Wilson's death certificate lists "'Malnutrition, probable infection' as the immediate cause of death . . . Wilson was a chronic alcoholic," the implication clearly being that Wilson's death was caused by his alcoholism. It is true that Wilson's death certificate lists "Malnutrition, probable infection" as the immediate cause of death. However, the very next line of the death certificate states that Wilson's malnutrition, and thus his death, was due to "Metastatic carcinoma." In fact, it appears that Wilson suffered, and died, from pancreatic cancer—one of the "radiogenic diseases" expressly recognized by the VA. 50 Fed.Reg. 34,459 (1985). There is no mention of alcoholism in Wilson's death certificate, let alone any suggestion that this was the cause of his death. Defendant's unsupported assertion to the contrary, and Mr. Warner's partial and obviously misleading quotation from the death certificate, are wholly inexcusable. Although plaintiffs have not expressly requested sanctions, this is one of those cases that cries out for the application of Rule 11. Mr. Warner's declaration will be struck in its entirety. Although this may not have any significant impact on the motion itself, it is intended to send a strong message to the responsible individuals in Washington[4] that this kind of conduct will not be tolerated. In addition, the court notes that

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[4]The court is satisfied that defense counsel who appeared at oral argument was neither aware of nor directly responsible for the offending misrepresentations.

it will treat any future submissions by Mr. Warner with due skepticism.

4. Adequacy of Representation

There are two aspects to the requirement of Rule 23(a)(4) that the representative plaintiffs will fairly and adequately protect the interests of the class: (1) the class representatives' attorneys must be qualified and experienced, and (2) the suit must not be collusive and the interests of the representative plaintiffs must not be antagonistic to those of the remainder of the class. *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24, 42 (N.D. Cal. 1977) (citing *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562-63 (2d Cir. 1968)).

Defendants do not contest the experience and competence of plaintiffs' counsel, and there is no suggestion that this action is in any way collusive. Defendants contend, however, that the interests of the named plaintiffs are antagonistic to the interests of many putative class members because: (1) there *may* be claimants who do not wish to hire an attorney but who, if plaintiffs prevail, *may* feel forced to do so based on the belief that claimants without an attorney will be treated as "second-class" claimants; (2) there *may* be claimants who believe the current non-adversarial system is preferable to an attorney-based adjudication system and who, if plaintiffs prevail, *may* lose the benefit of the current non-adversarial system; and (3) if plaintiffs do *not* prevail, individuals with "truly complex" cases would be foreclosed from retaining counsel. There is no merit to these contentions.

These arguments are illogical in view of defendants' position throughout this litigation, namely, that the VA and service organizations are able and willing to assist applicants with their claims no matter how simple or complex. They offer no factual basis for their arguments.

Of course, plaintiffs do not seek to "force" anyone to hire an attorney. Their position is that any radiation claimant who

wishes to hire an attorney has a constitutional right to do so.[5] Even if plaintiffs ultimately prevail, it is highly unlikely that the purported benefits of the current "non-adversarial" system would be lost. As Justice Rehnquist noted, ionizing radiation claims and "agent orange claims" (which are not at issue in this action) *together* compromise only about .3% of all SCDD claims. There is no reason to believe that permitting attorneys to represent claimants in this small fraction of cases would so transform the entire veterans' claims system so as to eliminate the benefits of what would remain almost entirely a non-adversarial system.

Finally, defendants appear to argue that although ionizing radiation claims are not, as a class, inherently complex, there are some "truly complex" claims for which applicants should be entitled to retain counsel. This is curiously at odds with their earlier position in this case. In any event, whatever the ultimate resolution, there is no reason to believe, as defendants suggest, that any claimant will be precluded from establishing the complexity of his or her claim on a case-by-case basis. For instance, in *Cleaver v. Wilcox*, the Ninth Circuit held that indigent parents were not, as a class, entitled to appointed counsel in dependency hearings yet had no trouble holding that class members nonetheless would have the opportunity to establish their right to counsel on a case-by-case basis. 499 F.2d at 945-46.

In short, the court finds no reason to believe that the interests of the named plaintiffs are antagonistic to those of other class members or that the named plaintiffs will, in any other

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[5]For this reason, the cases cited by defendants are clearly inapposite. In each case, the plaintiffs sought to compel certain action which some class members might wish to prevent, e.g. *Nguyen Da Yen*, 70 F.R.D. 656 (unification of Vietnamese children with their biological parents in Vietnam), or to prevent certain action which some class members might not want prevented, e.g. *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940) (breach of racially restrictive covenant); *Phillips v. Klassen*, 502 F.2d 362 (D.C.Cir. 1974), *cert. denied*, 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1974) (offer of early retirement).

respect, fail to fairly and adequately represent the interests of the class.

Requirements of Rule 23(b)

In addition to meeting all of the requirements of Rule 23(a), the class must meet at least one of the requirements of 23(b). This action clearly meets the requirements of Rule 23(b)(2) that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. ..." Defendants have, without exception, precluded all ionizing radiation claimants from retaining counsel to represent them in connection with their SCDD claims. If plaintiffs can ultimately establish that ionizing radiation claims are, by their very nature, so complex that counsel is required to ensure a constitutionally adequate hearing, injunctive and declaratory relief will clearly be appropriate. If, on the other hand, the court ultimately holds that ionizing radiation claims are not inherently complex but that claimants must be given the opportunity to establish the complexity of their claim on a case-by-case basis, "a statement of due-process principles in the form of a declaratory judgment" to this effect would still be appropriate. *Cleaver*, 499 F.2d at 945.[6]

In addition, the prosecution of separate actions by individual members of the class would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Fed.R.Civ.P. 23(b)(1)(A). Even assuming that all courts would interpret the Supreme Court's decision in this case as requiring that veterans be permitted to retain counsel in cases of sufficient complexity, courts will undoubtedly have different and often in-

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[6]Of course, if the court were to hold that ionizing radiation claimants have no right to retain counsel no matter how complex their individual claim—a position which even defendants do not assert—a declaratory judgment on a class-wide basis would clearly be appropriate.

consistent views concerning, *inter alia*, what guidelines and standards to apply in determining whether a specific claim is "sufficiently" complex, whether a claimant is entitled to a *judicial* determination of complexity in every case, and whether the burden of establishing complexity should shift or change depending on whether the underlying claim is of a type that is inherently complex. Separate adjudication of these and other related issues is likely to lead to the establishment of incompatible standards of conduct for defendants regarding the application of the fee limitation.

Class Definition

Defendants contend that the proposed class, as currently defined, can not be squared with the Supreme Court's decision in this case. Defendants place particular emphasis on Justice O'Connor's statement that, "In its present posture, this case affords no sound basis for carving out a subclass of complex claims that by their nature require expert assistance beyond the capabilities of service representatives to assure the veterans '"[a] hearing appropriate to the nature of the case."'" 105 S.Ct. at 3198 (citations omitted). Defendants contend that, "[i]n view of plaintiffs' failure to adduce any creditable evidence since the Supreme Court's decision," there is still no sound basis for carving out a subclass of "complex cases," let alone the one proposed by plaintiffs.

Defendants misconstrue Justice O'Connor's comment. First, it appears that Justice O'Connor's reference to the "present posture" of the case may not have been a reference to the state of the evidentiary record at all. By "present posture," Justice O'Connor may well have been referring to the fact, which she had noted in the preceding sentence, that plaintiffs' claims were "not framed as a class action nor were the lower court's findings and relief narrowly drawn to reach some discrete class of complex cases." *Id.* at 3198. Thus, Justice O'Connor may have meant only that, in light of plaintiff's failure to provide a "definition or quantification of 'complex cases'" by identifying and seeking relief on behalf of a particular class, and the district court's failure to provide such a definition or quantification by way of narrowly drawn findings,

there was no sound basis for the Supreme Court *itself* to carve out such a group. Rather, this is a task properly left to the plaintiffs in the first instance and, ultimately, to the district court. Indeed, Justice O'Connor expressly held that the issue remained open on remand and should be considered by this court. *Id.*

Even assuming, however, that Justice O'Connor's comment related to the state of the evidence, it does not follow that plaintiffs' failure to present any substantial additional evidence since the Supreme Court's decision precludes certification of the proposed class.[7] It is clear from Justice O'Connor's opinion that she believed the fee limitation would be unconstitutional as applied to a discrete group of claims which, by their very nature, are so complex that the assistance of an attorney is necessary to ensure a fair and adequate hearing. In other words, if plaintiffs could establish the existence of such a group, they would be entitled to prevail *on the merits*. To require plaintiffs to establish that the proposed class *is* such a group in order to obtain class certification, as defendants urge, would be to require plaintiffs to prove their case on the merits as a pre-requisite for bringing a class action—a position which defendants themselves recognize as untenable. (Defs' Opp. at 14).

Defendants also rely on Justice Rehnquist's statement that at least 30% of all ionizing radiation claims are disposed of because the medical examinations reveals no disability and that such claims, therefore, can not be considered complex "by any fair definition of that term." 105 S.Ct. at 3194. Thus, defendants argue, at least 30% of the proposed class is made up of class members whose claims are not "complex" and who, therefore, are clearly not entitled to retain counsel.

This comment is based solely on the record available at the time of the preliminary injunction. The Justice goes on to con-

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[7]Of course, Justice O'Connor's comment was not in reference to the propriety of class certification; plaintiffs had not yet amended the complaint to add a class claim, let alone proposed a specific class.

clude that not all such claims would be complex. However, implicit in his observation is the lack of a basis for determining the number of complex cases. At the trial on the merits the court will have to make this determination and take into account the realities of the claims adjudication process. For example, a veteran seeking SCDD benefits must present the VA with all supporting evidence and documentation at the time he or she files the claim for benefits. The VA then considers all this evidence, along with the report of the examining VA doctor, to determine whether and to what extent the claimant is entitled to benefits. Thus, at the time the claimant must develop and present the evidence to support his claim—tasks which plaintiffs contend requires the assistance of counsel—there is no way of knowing on what grounds the VA might ultimately decide the claim. In light of the nature of the claims process, the court concludes that for purposes of determining a claimant's right to counsel, the complexity of the claim must be judged in terms of the nature and extent of the showing the claimant will have to make in submitting his claim to the VA—not on some retroactive assessment of whether the VA's ultimate decision is a complex one. In other words, it is the nature of the *claim* presented to the VA, not the nature of the VA's ultimate *decision*, that determines "complexity" for purposes of a claimant's right to counsel. Under this view, the fact that the claims of some putative class members might ultimately be denied on the grounds that they suffered no disability, does not render their inclusion in the proposed class inappropriate.

In addition, plaintiffs may be able to establish that, because of the nature of radiation-related diseases, establishing the existence of a medical disability in ionizing radiation claims is, to a constitutionally significant degree, more complex than establishing disability in other cases. Although the current record would not support such a finding, plaintiffs should be given a reasonable opportunity to present evidence on this issue.

CONCLUSION

The court finds that the requirements of Rule 23 have been met and that the proposed class may be conditionally certified as currently defined, subject to modification should the court determine that such modification is warranted either by the evidence or applicable law.

IT IS SO ORDERED.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, et al., Plaintiffs, v. Edward J. DERWINSKI, Secretary of Veterans Affairs, et al., Defendants.

No. C-83-1861-MHP.

United States District Court, N.D. California. Jan. 29, 1992.

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Charles Horsky, Covington & Burling, Washington, D.C., Special Master.

Robert L. Gnaizda, Public Advocates, Inc., San Francisco, Cal., for American G.I. Forum.

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

PATEL, District Judge.

Plaintiffs have brought this action to challenge the constitutionality of 38 U.S.C. §§ 3404 and 3405 (now codified as amended at 38 U.S.C. §§ 5904 and 5905), which limit the fee a veteran or veteran's survivor may pay to an attorney to assist him or her in prosecuting a claim before the Veterans Administration ("VA") to $10.00, and which impose criminal penalties on attorneys who accept fees in excess of the $10.00 limit. By order of June 12, 1984, this court granted plaintiffs'

motion for a preliminary injunction prohibiting the enforcement of the $10.00 fee limit. *National Ass'n of Radiation Survivors v. Walters,* 589 F.Supp. 1302 (N.D.Cal.1984) ["NARS 1"]. The Supreme Court reversed, holding that the fee limit was not unconstitutional on its face. *Walters v. National Ass'n of Radiation Survivors,* 473 U.S. 305, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985) ["NARS II"]. However, the Court's opinion left open the possibility that, on remand, plaintiffs would be able to show that the fee limit was unconstitutional as applied to particular classes of complex claims. *See NARS II,* 473 U.S. at 337-38, 105 S.Ct. at 3197-98 (O'Connor, J., concurring).

On remand, plaintiffs amended their complaint to challenge the constitutionality of the fee limit as applied to claimants with service-connected disability or death ("SCDD") compensation claims based on exposure to ionizing radiation. This court granted plaintiffs' motion for certification of a class consisting of "all past, present and future ionizing radiation claimants who have, or will have, some form of `active' claim relating to SCDD benefits before the VA." *National Assn of Radiation Survivors v. Walters,* 111 F.R.D. 595, 598 (N.D.Cal. 1986) ["NARS III"]. After extensive pretrial proceedings, the matter was tried to the court over a period of nearly two months. The trial included testimony by numerous expert witnesses regarding the medical, scientific and legal complexities characteristic of ionizing radiation claims.

During and after the trial Congress worked to change the manner in which veterans' claims were adjudicated and reviewed. After adoption of the Veterans' Judicial Review Act of 1988, Pub.L. No. 100-687, 102 Stat. 4105 (1988), the parties went to great lengths to settle this action in light of the new legisla-

tion.[1] Ultimately, the efforts to settle were unsuccessful and the parties returned to this court for a decision on the merits based upon the trial record and other post-trial submissions.

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[1]The Veterans' Judicial Review Act of 1988 ("JRA") was signed into law on November 18, 1988. The JRA amended the fee limitation challenged by plaintiffs in this case by providing that a fee may be paid for attorney services rendered after the date of the first date on which the Board of Veterans Appeals renders a final decision in a case and by creating the United States Court of Veterans Appeals to provide judicial review for BVA decisions.

The fee provisions of the JRA, however, apply only to cases in which a Notice of Disagreement was filed with the VA on or after the Act's date of enactment. Thus, the fee limitation challenged in this case still applies to those members of the class who are past or current claimants and filed a Notice of Disagreement prior to November 18, 1988.

The court declined plaintiffs' invitation to rule on the constitutionality of the JRA in this suit and instead encouraged the parties to enter into settlement negotiations which might afford the same protections provided by the JRA to those members of the class not covered by the Act. After negotiations conducted over almost two years, the parties failed to reach an agreement, leaving the court to rule on the constitutionality of the fee limitation as it applies to those members of the class not covered by the JRA.

The court also notes that two other relevant pieces of legislation have been enacted since the trial in this case. The Radiation-Exposed Veterans Compensation Act of 1988, P.L. 100-321, creates a presumption of service connection for thirteen diseases which manifest to a degree of ten percent within specified latency periods. The Radiation Exposure Compensation Act, P.L. 101-426, provides one time payments of $50,000 to individuals who participated onsite in a test involving the atmospheric detonation of a nuclear device, developed a disease specified in the statute, and meet certain other conditions. The lump sum payment will be decreased by the amount of "any payment made pursuant to a final award of settlement on a claim" based on injuries resulting from exposure to radiation. P.L. 101-426, § 6(c)(2). It appears that veterans' benefits received may be included in this offset. 136 Cong.Rec. H12271-72 (daily ed. Oct. 23, 1990) (Conf.Rep. on H.R. 4739).

Having reviewed these public laws, the court has determined that they do not moot the claims of the class as a whole. Thus, the court must rule on the constitutionality of the fee limitation as it applies to those members not covered by the JRA or the other public laws described above.

Having considered the evidence presented at trial and the arguments of the parties, and based on the findings of fact and conclusions of law set forth below, the court holds that the $10.00 fee limitation on attorneys' fees imposed by 38 U.S.C. 3404 and 3405 (now codified as amended at 38 U.S.C. §§ 5904 and 5905) is unconstitutional as applied to SCDD claims for benefits based on exposure to ionizing radiation.

LEGAL FRAMEWORK

Plaintiffs argue that the $10.00 fee limit, as applied to SCDD claimants whose claims are based on exposure to ionizing radiation and who are not covered by the Veterans' Judicial Review Act of 1988, violates due process and the First Amendment because it deprives claimants of a meaningful opportunity to present their claims to the VA and to petition the government.

A court faced with a procedural due process challenge must initially determine whether the plaintiffs possess a life, liberty or property interest protected by the Constitution. In reversing this court's order granting a preliminary injunction, the Supreme Court found it unnecessary to decide whether applicants for SCDD benefits possessed a protected property interest in those benefits. *NARS II*, 473 U.S. at 320 n. 8, 105 S.Ct. at 3189 n. 8. This court sees no reason to disturb its earlier determination that both recipients of and applicants for SCDD benefits possess a property interest protected by the Constitution. *See NARS I*, 589 F.Supp. at 1313-14. Indeed, the Ninth Circuit's decision in *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990), in which the court ruled that an applicant for social security disability benefits has a property interest in those benefits, buttresses this court's earlier ruling.

Once a court has concluded that the plaintiffs possess a protected interest, the court must examine the procedures provided for the protection of that interest to determine whether they meet the requirements of a due process challenge. *See NARS II*, 473 U.S. at 320, 105 S.Ct. at 3188. Determining what process is due requires consideration of the three factors set forth in *Mathews v. Eldridge*:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976); *see NARS II*, 473 U.S. at 321, 105 S.Ct. at 3189.

A deprivation of a liberty or property interest is not required as a premise for a First Amendment claim. *Perry v. Sindermann*, 408 U.S. 593, 596-98, 92 S.Ct. 2694, 2696-98, 33 L.Ed.2d 570 (1972). Moreover, "[t]he right of access to the courts is subsumed under the first amendment right to petition the government for redress of grievances." *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989). The Supreme Court has held that the First Amendment protects efforts by organizations and individuals to obtain legal representation for themselves or their constituents. The First Amendment protects union members' efforts to advise workers to obtain legal advice and to recommend specific lawyers, *Brotherhood of Railroad Trainmen v. Virginia ex rel Va. State Bar*, 377 U.S. 1, 8-9, 84 S.Ct. 1113, 1117-18, 12 L.Ed.2d 89, *reh'g denied*, 377 U.S. 960, 84 S.Ct. 1625, 12 L.Ed.2d 505 (1964); the employment of counsel by unions to represent their members, *United Mine Workers of America Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-22, 88 S.Ct. 353, 355-56, 19 L.Ed.2d 426 (1967), *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 580-85, 91 S.Ct. 1076, 1079-82, 28 L.Ed.2d 339 (1971); and the efforts of non-profit organizations to provide legal representation for persons seeking to vindicate their civil rights. *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

FINDINGS OF FACT

I. *Evidence Relevant To The Private Interest Affected*

Ionizing radiation ("IR") claimants are either veterans or their survivors (usually widows). Ex. 461. The record before the court indicates that IR claimants are generally poor, and in the cases of veterans themselves, almost always in poor health. RT at 1185-86. The Legal Services Corporation estimates that more than ten percent of all poor people in the United States are veterans or their dependents. Ex. 70 at 55. Evidence introduced by plaintiffs indicates that eleven percent of IR claimants have annual family incomes below $5000, forty-three percent have annual family incomes below $10,000, and sixty-eight percent have annual family incomes below $20,000. Ex. 460 at 5. In addition, seventeen percent of IR claimants have annual family medical expenses over $20,000, twenty-nine percent have medical expenses in excess of $10,000, and forty-five percent have medical expenses in excess of $5000. *Id.*

In light of this evidence, the court finds that a substantial majority of IR claimants would rely primarily on SCDD benefits for their basic maintenance and support.

II. *Evidence Relevant To The Risk Of Erroneous Deprivation*

A. Complexity of Governing Law and Procedures

IR claims, like other SCDD claims, are adjudicated within the framework of existing Veterans Administration ("VA") rules and regulations. In addition, a series of special VA rules and regulations have been promulgated specifically to address IR claims.

Veterans' law encompasses an extensive body of statutes, regulations, and other materials. RT at 23:2-27:4, 28:5-35:1, 38:8-40:4, 40:10-41:20, 50:17. The principal applicable statute is 38 U.S.C. §§ 101-7298 (formerly 38 U.S.C. §§ 1-4098). SCDD claims are also governed by regulations codified in the Code of Federal Regulations; a body of VA General Counsel opinions and Board of Veterans' Appeals ("BVA") decisions; VA circulars; and adjudication and program manuals. RT at 23-27.

These materials interface with each other and form a complex web of governing authority. RT at 71.

The competent use of these materials is a laborious task. For example, it is necessary to monitor the Federal Register for changes in governing regulations. RT at 27. General Counsel opinions are not digested, making them difficult to research and access. RT at 32. There are numerous relevant agency manuals, including the VA Adjudication Manual (M21-1), Ex. 456, which addresses agency adjudication procedures; the VA Program Guide (PG21-1), Ex. 459; the MBVA Manual, Ex. 457, which covers areas over which the BVA has jurisdiction; and the Field Appellate Procedure Manual (M21-4), Ex. 458, which regulates the conduct of hearings in the VA's regional offices. RT at 38-40, 44. The manuals are lengthy and it is often difficult to gain access to them.[2]

Under the federal regulations governing SCDD claims, an IR claimant must "submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded." 38 CFR § 3.102. The claimant must demonstrate not only that the disability exists or that the death occurred, but also that the disability or death is "service-related." 38 U.S.C. § 1101 *et seq.*

In addition to these general regulations, in 1985 the VA adopted a special set of regulations for IR claims in response to the mandate of P.L.98-542. These regulations are codified in 38 CFR § 3.311b. Section 3.311b sets forth three prerequisites that must be met in order for an IR claim to be referred to the Chief Benefits Director for further consideration: (1) that the veteran was exposed to ionizing radiation as a result of participation in the atmospheric testing of nuclear weapons, occupation of Hiroshima or Nagasaki, Japan from September 1945 until July 1946, or other activities as claimed; (2) that the veteran subsequently developed one of seventeen diseases enumerated in the regulation; and (3) that the disease first became

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[2]For example, the M21-1 Manual consists of fifty five chapters. *See* Ex. 456.

manifest within periods specified in the regulation.[3] Where the threshold criteria are not met, a claimant may still attempt to prove his or her claim by invoking section 3.304, the general VA regulation concerning direct service connection, or section 3.309, the general VA regulation which creates presumptive service connection for certain diseases manifesting to a designated degree within a specified period after separation from service. RT at 146:23-147:3.

The record indicates that the claim development process for IR claims is far more detailed and complex than that for other SCDD claims. If the VA regional office to which an IR claim is submitted determines that the claim meets the three threshold requirements of section 3.311b, the claim is then subjected to a review process. The regional office sends the claimant a "pattern" letter requesting detailed information regarding his or her claim. The pattern letter sent to IR claimants has more questions and requests more complicated information than the pattern letter sent in other SCDD claims. RT at 74, Ex. 456 at 22-6, Ex. 751. If the claimant does not respond to the pattern letter within sixty days the claim may be administratively disallowed for failure to prosecute. RT at 190, Ex. 465, 970.

The regional office then refers the claim to the Defense Nuclear Agency ("DNA") of the Department of Defense to obtain an estimate of the radiation dose level to which the claimant was exposed. 38 CFR § 3.311b(a)(2)(i)-(ii). The general procedures followed by the DNA, including dose reconstruction methodology and dose estimate reporting standards, are codified in 32 CFR § 218.1 *et seq*. If the claimant obtains an independent dose estimate from a "credible source" and that estimate is at least double the estimate provided by the DNA, the regional office will refer the case to an independent expert for a dose reconciliation. 38 CFR § 3.311b(a)(3).

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[3]Bone cancer must manifest within thirty years after exposure; posterior subcapsular cataracts must manifest six months or more after exposure; leukemia may manifest at any point after exposure; and other diseases must manifest five or more years after exposure. 38 CFR § 3.311b(b)(4)(i)-(iv).

Upon completion of the dose estimate by the DNA, the completed file is then submitted to the Administrative Review Staff ("ARS") of the Compensation and Pension Service ("CPS"). *See* Ex. 305, M21-1, Section 22.05.1(a)(3). In general, non-IR claims are not submitted to the CPS. The ARS reviews the claim and the CPS furnishes a recommendation for either denial or allowance of the claim to the regional office. Ex. 305, M21-1, Section 22.05(e)(3). The rating board of the regional office must consider the CPS recommendation prior to making a final decision on the claim. Ex. 305, M21-1, Section 22.05.2(e)(4).

Once the rating board of the regional office has made a determination regarding the claim, it issues a Notice of Decision ("ND") to the claimant. 38 CFR § 3.103. The rating decision is based on a complicated schedule containing detailed anatomical data and other criteria. 38 CFR § 4.1 *et seq*. If the claim is denied, the claimant may file a Notice of Disagreement ("NOD") within one year of the mailing of the ND; if no NOD is timely filed, the ND is deemed final. 38 CFR § 19.129(a). If an NOD is timely filed, the regional office will reconsider its decision. If the denial is affirmed, the regional office issues a Statement of the Case ("SOC"), stating the basis for the denial. 38 CFR § 19.120.

The claimant has sixty days from the issuance of the SOC or the remainder of one year from the mailing of the ND to file an appeal. 38 CFR § 19.129(b). The appellant is not presumed to be in agreement with any statement of fact in the SOC to which the appellant does not specifically express agreement. 38 U.S.C. § 7105(d)(4). However, the claimant's appeal must set out specific factual or legal grounds for the appeal. 38 CFR § 19.123(a).

The claimant's appeal is reviewed by the BVA. If the BVA denies the appeal, the claimant may move to reconsider when there has been an obvious legal or factual error or when new evidence is discovered. 38 CFR §§ 19.104, 19.185. The claimant may also reopen the claim at the regional office level with new and material evidence.

The claimant is entitled to a hearing, upon request, "at any time on any issue involved in a claim. ..." 38 CFR § 3.103(c). The claimant is also allowed at all stages to introduce documentary, testimonial or other evidence. 38 CFR § 3.103(d).

B. Complexity of Medical Issues

The evidence before the court shows that the medical issues present in IR claims are far more complex than those in other SCDD claims and that the average claimant is not capable of understanding the medical intricacies of an IR claim.

The record reflects that there is a wide array of conflicting expert opinion in an extensive body of medical literature concerning the relationship between cancer and ionizing radiation. The evidence in this case shows disagreement about the following issues: (1) the degree of risk associated with exposure to low levels of ionizing radiation; (2) the latency periods between radiation exposure and the manifestation of certain cancers; (3) the shape of the dose-response curve for exposure to low levels of ionizing radiation; (4) the susceptibility of certain organs and tissue to cancer induction through exposure to ionizing radiation; (5) the manner in which different carcinogenic agents interact and function synergistically; (6) the validity of, and how to interpret, existing epidemiological data on the health effects of exposure to ionizing radiation; (7) the validity of reports produced by groups such as the BEIR III Committee and the United Nations Special Commission On The Effects Of Atomic Radiation ("UNSCEAR"), which the DNA and VA rely on as authoritative sources of data regard-

ing radiation exposure;[4] and (8) the validity of radioepidemiological tables relied on by the VA. RT at 621, 622, 626:2-628:3, 660-62, 1573, 3972-73, 683, 3966-87, 1578:8-25, 4768:8-4794:19, 611-12, 659:14-660:12, 675:1-7, 1574:18-1578:7, 4824:22-4826:5. *See* Exs. 1163, 1164, 1166, 1193, 1228, 1283, 1290, 1330, 1332, A-6092.

While the court need not address each of these issues, several key areas of complexity are examined below to illustrate the complicated nature of the medical issues involved in IR claims.

1. *Complexity of Causation Issues*

Because cancers are synergistic, the evaluation of different risk factors is an inherently complicated endeavor. RT at 602-03, 3256:25-3257:24, 4738:11-4739:10. The examination of a malignancy, for example, will not reveal the cause of the cancer in question. RT at 604. Thus, determining whether exposure to ionizing radiation contributed to the causation of cancer is extremely complex. The record reflects that making such a determination requires consideration of numerous factors, including the circumstances of exposure; the amount and rate of radiation exposure; the type of radiation received (gamma,

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[4]Under the auspices of the National Academy of Sciences and the Environmental Protection Agency, a committee of the National Research Council was established to investigate and report on the health consequences of radiation exposures. The Committee known as the BEIR (Biological Effects of Ionizing Radiations), has produced a number of reports. The court has been asked to take judicial notice of several of these, including the last report, BEIR V. Much of the early and ongoing work of the BEIR Committee has been testified to by experts for plaintiffs and defendant. Accordingly, this court has taken judicial notice of BEIR V and considered the discourses contained in the BEIR reports entered into evidence or judicially noticed in this case.

beta, alpha, neutron, low LET and high LET[5]); the pathways of radiation exposure; the duration of exposure; the age at manifestation of the disease; the nature of the veteran's disease; the effects of other risk factors and of exposure to other carcinogenic agents; the medical history of the veteran; the latency period between exposure and disease manifestation; the veteran's health at the time of exposure; the veteran's gender; and whether the veteran manifested acute symptoms of radiation exposure just after exposure. RT at 631:5-637:8, 1526:6-1528:14, 2308:13-2310:11, 2317:12-2318:22, 2319:25-2326:22.

Experts disagree on numerous issues with regard to cancer causation. RT at 605-06. For example, the record reflects disagreement among the expert witnesses of plaintiffs and defendant as to whether all cancers may be caused by radiation and whether certain organs may be excluded from the list of radiation-induced cancers. RT at 621, 4000-02.

2. *Complexity of Disease Classification And Manifestation Issues*

The evidence before the court indicates that determining whether a claimant's condition is covered by one of the diseases listed in the ionizing radiation regulations can present complex issues of disease classification.[6] RT at 1486:10-1494:13, 1503:1-1515:15. Statistics introduced into evidence by the plaintiffs indicate that forty-nine percent of IR claimants who

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[5]High LET radiation is radiation with dense ionization which produces a greater biological effect at lower physical doses of radiation. Low LET radiation, in contrast, has few ionizations. X rays and gamma rays are examples of low LET radiation, while alpha particles are a form of high LET radiation.

[6]Section 3.311b(b)(2) defines radiogenic diseases to include the following: (1) all forms of leukemia except chronic lymphatic leukemia, (2) thyroid cancer, (3) breast cancer, (4) lung cancer, (5) bone cancer, (6) liver cancer, (7) skin cancer, (8) esophageal cancer, (9) stomach cancer, (10) colon cancer, (11) pancreatic cancer, (12) kidney cancer, (13) urinary bladder cancer, (14) salivary gland cancer, (15) multiple myeloma, (16) posterior subcapsular cataracts, and (17) non-malignant thyroid nodular disease.

claim disability due to radiation exposure suffer from diseases not included in § 3.311b(b)(2). Ex. 460.

Assessing the period of time from exposure to manifestation of a disease is also a difficult task. RT at 683. One complication is caused by the fact that the IR regulations do not specify what is meant by manifestation; thus, manifestation may be defined as the date of cell damage, the date of pre-diagnosis manifestations, the date of onset of symptoms, or the date of diagnosis. RT at 1494:14-1502:3. Determining the date of cell damage, prediagnosis manifestations and the date of the onset of symptoms may require numerous tests and an exacting assessment of an array of medical factors. RT at 1494:14-1502:3. There is evidence in the record of claim denials based on erroneous interpretations of the regulatory manifestation periods by the VA. RT at 88, Ex. 922.

3. *Validity Of Radioepidemiological Tables*

Radioepidemiological tables have been developed by the National Institute of Health (NIH) to provide estimates of the probability of causation for various radiogenic diseases based on differing levels of exposure to radiation. The tables are relied on by the VA in assessing IR claims.

The evidence before the court demonstrates that experts disagree as to the validity of the tables. Plaintiffs' expert witnesses testified that use of the tables was inappropriate in deciding individual IR claims. Among the criticisms of the tables are that (1) they underestimate the risks of exposure to ionizing radiation, RT at 675:1-7; (2) they fail to take account of consequences of exposure to high LET radiation, RT at 673:22-674:2, 3267:7-14; (3) they fail to take into account factors important in evaluating causation, RT at 1543:20-24; (4) they fail to take into account regional variations in cancer incidence, RT at 672:17-673:21; and (5) they are subject to a high degree of uncertainty. RT at 1546:8-1548:15, 3260:22-3262:8, 4799:12-4802:13.

In light of the complexity of the medical issues involved, disagreement in the medical field with regard to cancer causation issues and the health effects of low level exposure to ion-

izing radiation, the difficulty of disease classification and of discerning disease manifestation periods, and conflicting evidence regarding the validity of radioepidemiological tables employed by the VA and of other epidemiological data available in the field, the court finds that proper presentation and adjudication of IR claims will often require the marshalling of expert medical opinion and testimony.

C. Complexity of Scientific Issues

The evidence reflects that the scientific issues involved in IR claims are extremely complex and are beyond the capacity of a lay-claimant to understand.

1. *In General*

Four types of radiation were produced by the nuclear explosions at issue in this case—gamma rays, alpha particles, beta particles, and neutron radiation. Each has distinct properties and distinct health repercussions. RT at 468. There were also different pathways of exposure. A pathway identifies the source of radiation and the route by which the radiation exposes the individual. The three principal pathways of exposure are external, internal and absorption. RT at 472:16-473:6.

Gamma rays and neutrons are the primary sources of external exposure, or exposure to the body surface. There can also be some external exposure from beta particles, but the low penetrating power of these particles means they generally expose only superficial parts of the body. RT at 473.

Sources of internal exposure via ingestion and inhalation include all sources of external exposure and alpha particles. RT at 474. The radiation dose attributable to internal exposure through inhalation depends on numerous factors, including the properties of the radionuclides inhaled, respiration rate, the characteristics of the tissues involved, and metabolism and excretion rates. RT at 474:9-475:17, 507:5-510:2, 1968:5-23. Ingestion encompasses activities such as eating and drinking contaminated food and liquid and other activities like cigarette smoking.

The third pathway is absorption, which encompasses exposure through an open wound or penetration of the intact skin by radionuclides. The degree of exposure through absorption depends on numerous factors, including the nature of the wound, the concentration of the radioactive material and the properties of the radionuclides involved. RT at 475:23-476:3, 510:3-511:21.

2. *Radiation Dose Estimates*

The record indicates that one of the most important steps in adjudication of an IR claim is estimating the dose of radiation to which the veteran was exposed. Based on the evidence introduced at trial, the court finds that estimating radiation doses is a complicated endeavor involving a multitude of factors. Among the tasks which must be undertaken in estimating the dose of radiation to which a veteran was exposed are: (1) analysis of test factors, including weapon type and yield, the veteran's location in relation to the test, weather patterns, and the type of shielding or protective gear utilized; (2) evaluation of the mode of exposure; (3) collection and interpretation of available data from test sites, including data from film badges, geiger counters and other measuring instruments; and (4) evaluation of DNA dose estimates, including analysis of models and reports used in preparation of the estimates. RT at 1931:13-1940:1.

The Defense Nuclear Agency ("DNA") furnishes radiation dose estimates to VA regional offices in connection with IR claims. When the claimant wore a film badge[7] at the time of exposure, the DNA relies on the film badge reading to determine the dose estimate. Where a substantial percentage of the unit was badged, the DNA uses dose assignment methodology to assign a dose estimate to unbadged members. Where sufficient film badge data is not available, the DNA develops generic dose reconstructions based on data collected regarding

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[7] A film badge is a small piece of film encased in a metal or plastic container which can be attached to clothing. Film badges are common means by which individual radiation exposure is measured.

a particular test site and assigns the dose estimate produced in this way to the individual claimant. RT at 3666-67.

The record indicates much disagreement regarding the validity of the dose estimates provided by the DNA. For example, there is disagreement among scientific experts with regard to the reliability of film badge data. Many test participants and occupation troops were not badged; some were badged for only a portion of their periods of exposure. RT at 531:8-534:73, 3705-06. In addition, the validity of film badge data has been questioned because the badges are directionally dependent, i.e. they more accurately measure exposure in the direction they face than exposure at other points. In addition, the badges do not measure internal exposure and do not accurately measure beta radiation exposure. RT at 516:24-521:11, 1943:19-1946:10. Moreover, the limit of some film badges used by the U.S. military to measure radiation exposure at nuclear testing sites was two rems,[8] meaning the badges were unable to record exposure at higher levels. RT at 530:17-25. Finally, plaintiffs' experts testified that the inaccuracy of film badges is exacerbated under field conditions. RT at 516:10-518:14, 529:16-530:16, 1437:5-24.

In developing dose estimates for IR claimants in the absence of film badge data, the DNA has relied primarily on generic dose reconstructions, which reconstruct the dose to which the DNA believes members of a group participating in a particular nuclear test have been exposed. Procedures for development of dose reconstructions by the DNA are codified in 32 CFR § 218.1 *et seq*. Generic dose reconstructions do not take into account particularized information concerning the activities of the individual at the test site.

The evidence demonstrates that the type of generic dose reconstruction engaged in by the DNA is extremely complex and the subject of much controversy. The DNA dose reconstructions rely, *inter alia*, on data regarding radiologic conditions obtained by analysis of data on contamination levels, soil

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[8]A rem is a unit of dose expressing the biological effectiveness of radiation.

samples, and water samples, as well as health studies, mortality studies and oral interviews. RT at 3670-3676.

Trial testimony suggests that numerous other factors should also be considered in order to develop an accurate dose reconstruction. These factors include the nature of the weapons test, the rate of radioactive decay and distribution, and the effect of environmental forces like rain and wind. Factors personal to the claimant should also be weighed. These factors include the location of the veteran in relation ground zero, activities the undertaken by the veteran, when the veteran entered the radioactive area, and the protective gear the veteran utilized. RT at 472:16-480:7 482:24-488:25, 507:5-511:2, 1931:13-1940:2, 3727:3-3731:8, 630-32.

The evidence further indicates that the ability to prepare accurate dose reconstructions is limited by numerous factors, including the passage of time and deficiencies in the monitoring devices used at test sites. RT at 512:13-513:7, 514:17-523:10, 534:8-553:12, 1450:15-1455:5, 1457:7-1458:5, 528:16-536:12, 1967:10-1968:15.

The record reflects considerable disagreement among experts regarding the accuracy of generic dose reconstructions produced by the DNA. In addition to the failure to consider the factors identified above, plaintiffs' expert witnesses offered numerous other criticisms of the DNA reconstructions. For example, the assumptions employed in the DNA models are alleged to frequently be inaccurate and not properly documented. RT at 536-38, 562-64, 572:25-574:16, 584:4-585:14, 1355-57, 1948-49, 2049-65. In one case, plaintiffs' expert witness testified that the DNA model for Operation Crossroads made inaccurate assumptions concerning both the relevant radiation field and the behavior of the combat teams in the test area. These incorrect assumptions allegedly led to an underestimation of exposure. RT at 2005-2040. The generic dose reconstruction for Shot Simon also appears to have been based on inaccurate assumptions regarding troop movements. RT at 2018-22, 3753-54, 2035:5-8, 2029:7-20, 2028:23-2030:4.

In addition, there is trial testimony that the models for some tests fail to consider material pathways of radiation exposure. RT at 564:10-566:16, 1432-34, 2049-65, 1986-87. For example, plaintiffs' expert testified that the model for Operation Crossroads failed to consider contaminated air, soil and lagoon water, among other factors, as possible sources or pathways of radiation exposure. RT at 564-71. Two General Accounting Office reports introduced into evidence raise additional questions regarding the validity of the dose reconstruction model for Operation Crossroads. Ex. 555, 1342.

Certain DNA dose reconstruction models are alleged to improperly evaluate internal exposure. RT at 1970-76. For example, the Shot Simon dose reconstructions failed to consider ingestion, while the evidence shows that the ground troops were issued bag lunches to take with them to the test site. RT at 1998:18-1999:7. There is also evidence that some DNA models utilize faulty uncertainty analysis, thus disguising the degree of uncertainty in the models and overestimating the accuracy of the calculation produced. RT at 576-78, 1955:15-1962:6, 2039:3-22.

In light of the evidence in the record and the numerous factors relevant to dose estimates cited above, the court finds that individualized dose reconstructions, tailored to the particularities of the individual claim, are more accurate predictors of the radiation exposure of an individual than generic dose reconstructions. RT at 488-90, 506:12-507:4, 591-92. The court also finds that particularized information concerning a veteran's activities at a nuclear testing site can be extremely useful in obtaining an accurate individual dose reconstruction. RT at 505:25-507:4.

The court further finds, based on the evidence demonstrating the complexity of radiation dose reconstruction and the disagreements in the field concerning the validity of film badge data and the development and application of dose reconstruction methodology, that adequate presentation and adjudication of IR claims will generally require marshalling expert scientific and medical evidence in complex and disputed areas of the fields implicated.

D. Complexity of Factual Development

Given the tremendous diversity and complexity of the medical and scientific issues involved in IR claims, it is not surprising that properly developing the facts underlying these claims is an extremely intricate undertaking. A plethora of information is useful in establishing pathways to which a veteran might have been exposed at the time of the nuclear explosion and other factors which may have contributed to the claimant's health problems. Such information is essential to proving the level of radiation exposure, completing an individual dose reconstruction and demonstrating causation.

Among the information which can be vital to an IR claim is where the veteran was located at the time of the explosion. In the case of veterans stationed on ships, where the ship was berthed and where on the ship the veteran was bunked are both extremely relevant. RT at 164-65. Activities undertaken by the veteran, such as decontamination of a ship or participation in a landing party disembarking on a contaminated island, are pertinent. What type of bomb was exploded, when the veteran entered the radioactive area and how long he remained there, what type of protective shielding was available and if and when the veteran used it are all germane to an IR claim and therefore should be a part of complete factual development. RT at 630-32.

The fact development process is greatly complicated by the fact that much of the necessary information is not easily obtained. For example, numerous documents must be collected and provided to a health physicist if an independent and individualized dose reconstruction is to be completed. These documents include technical reports concerning the test, internal dose assessments, and documents showing the whereabouts and activities of the veteran. RT at 1113-14. Many important documents, such as ship blueprints and other materials important to identification of pathways of exposure must be obtained from the appropriate government agencies by making a request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Some documents may be classified, thus requiring declassification through the Secrecy Act, 50 U.S.C. § 401. In

addition, it often is extremely useful to discover the identity of other veterans who participated in a particular test along with the claimant in order to obtain information regarding the claim. This information is difficult to acquire and often must be obtained through the Privacy Act, 5 U.S.C. § 552a.

III. *Evidence Relevant To Existing Safeguards*

There are several facets of the VA claim adjudication system which are designed to safeguard the procedural rights of SCDD and IR claimants. The court now turns to an examination of the evidence with respect to these supposed safeguards.

A. Presumptions in Favor of the Claimant

Section 3.309 creates a presumption of service connection for enumerated diseases which manifest in a compensable degree within applicable time limits. 38 CFR 3.309. Therefore, claimants who can demonstrate that they have been afflicted by a specified disease within the appropriate manifestation period need do nothing more to prove service connection.

While section 3.309 creates a presumption in favor of the claimant, evidence presented at trial demonstrates the illusory nature of this safeguard. First, manifestation periods are often difficult to determine, and as the evidence before the court concerning the complexity of medical issues demonstrates, it will frequently be a complicated task for a claimant to prove precisely when a disease first manifested itself. RT at 1494:14-1502:3.

Second, the presumptive periods created by section 3.309 have been misapplied by the VA to the detriment of claimants, leading to the erroneous denial of claims. RT at 89, 146, Ex. 922. Ex. 454 [NAM004 0441]. For example, the VA denied plaintiff Reason Warehime's IR claim for lung cancer because the cancer did not manifest within one year of exposure. Ex. 454 [NAM004 0441]. However, while sections 3.307 and 3.309 create a presumption of service connection for malignant tumors which manifest themselves within one year from the termination of military service, nowhere do these regulations

create a presumption that a malignant tumor is not service-connected if it does not manifest within one year.

Third, the threshold requirements of section 3.311b can function to offset the protections of the presumptive periods in that the VA may deny claims which fail to meet one of the three threshold requirements even when the claimant might be eligible for benefits under section 3.309. RT at 145-47.

The court finds that section 3.309 does not effectively safeguard the rights of IR claimants or contribute in any significant way to the proper adjudication of IR claims.

When "a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant." 38 CFR § 3.102. The evidence indicates that in IR claims the "reasonable doubt" provision does not provide a significant safeguard to the claimant. RT at 148-50. Section 3.102 defines reasonable doubt as "an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim." The sharp disagreements among experts concerning many of the medical and scientific factors central to determining the validity of an IR claim makes application of the reasonable doubt standard exceedingly difficult. The synergistic nature of cancers makes application of the standard even more problematic, especially in light of the provision in section 3.311b(g) that service connection will not be established "if there is affirmative evidence to establish that a supervening, nonservice-related condition or event is more likely the cause of the disease." RT at 149, 434-35.

There is absolutely no evidence in the record to suggest that the reasonable doubt standard codified in section 3.102 has been employed by the VA in IR claims in a manner beneficial to claimants.

B. Informal and Non-Adversarial Nature of the VA Adjudication System

No evidence was presented at trial which supports the notion that the supposedly informal and non-adversarial nature

of the VA adjudication system for IR claims serves as a safeguard for claimants.[9]

The record indicates that the factual development of IR claims conducted by VA regional offices is extremely limited. An abstract of a random selection of 674 IR claims files prepared by plaintiffs indicates that no dose estimate was obtained by the VA regional office in fifty-nine percent of IR cases and that no physical exam was conducted in forty-eight percent of the claims. Ex. 461. Trial testimony suggests that those medical exams which do occur are of questionable quality. RT at 93:15-94:5. Indeed, in 509 cases the VA appears to have done no independent factual development. The lack of factual development appears to be due to the complicated nature of IR claims and to the fact that the VA's "work product" schedule does not provide additional work credits for IR claims, even though if adjudicated properly these claims clearly would be far more time-consuming than other SCDD claims. Ex. 458. Thus, there is an institutionalized incentive to underprepare the IR claims.

The evidence shows that in the vast majority of IR claims the VA does little in the way of fact development other than to collect the claimant's service and medical records and send the claimant a pattern letter. For example, the VA does not contact and interview other members of the claimant's former unit and does not seek the medical and military records of those members in order to detect patterns of exposure or disease among those individuals. RT at 3115:20-3117:22.

In light of the complex medical and scientific issues involved, the difficulty of obtaining appropriate records, and the limited ability of a lay-claimant or service representative to comprehend the relevant issues, pattern letters alone are not a sufficient or effective means of fact development. RT at 75, 96-98, 2332-33, 2344-47, 2349-50. Moreover, the use of complicated pattern letters acts to the claimant's detriment in that if the

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[9]The court notes that characterizing the byzantine procedures described in this order as "informal" appears to strain the meaning of the term.

claimant fails to respond to the pattern letter within sixty days, the claim may be administratively disallowed for failure to prosecute. RT at 168-69, Ex. 456, M21-1 Manual, §§ 7.01, 16.03.

Referral of IR claims to the Compensation and Pension Service ("CPS") for review and a recommendation provides little additional protection. Claimants are not given a hearing before the advisory review staff of the CPS. RT at 78:9-79:5. In addition, trial testimony indicates that the CPS staff have little training or expertise in radiation exposure. RT at 98-99. The importance of the lack of expertise of the CPS staff is magnified by the fact that at the time of trial, no IR claim had been identified where the rating board of the regional office had failed to follow a recommendation made by the CPS. Jt. Pretr. Conf. Stat. at 22.

The evidence before the court does not bear out the government's contention that the VA adjudication system for IR claims functions in a non-adversarial manner so as to safeguard the claimant's interests. Instead, the court finds the testimony of Keith Snyder, attorney for the Vietnam Veterans of America and the National Veterans Legal Services, to be credible and persuasive on this matter. Mr. Snyder testified that the VA's adjudication of IR claims is more accurately characterized as adversarial. RT at 257-59. The evidence supports Mr. Snyder's contention.

The record is replete with examples of the VA's lack of solicitude for IR claims and agency behavior that demonstrates a disregard for the procedural and substantive rights of IR claimants. *See, e.g.*, RT at 1086-94. For example, there is evidence that the VA actively discourages IR claimants from invoking their right to a hearing where they could more fully present their claims, provide expert medical and scientific testimony and respond to rating board concerns. Ex. 18 at 11, 17 at 137-39, 1042. Personal hearings are held in only 5.69% of IR claims. In less than one percent of the cases are those hearings held prior to the VA's initial determination. RT at 250. IR claimants are discouraged from requesting hearings despite the fact that the evidence shows that those claimants who have

hearings have a substantially higher success rate than those who do not. RT at 248-50.

The record indicates that, either by design or neglect, the VA has operated in such a manner so as to frequently put the claimant at a disadvantage in the adjudication process. Materials important to development of an IR claim often are not made available at VA regional offices. RT at 258. The vast array of materials, General Counsel opinions, and other documentation relevant to IR claims are not indexed so as to make them accessible to a lay-claimant. *Id.* And pattern letters sent to the IR claimant solicit information adverse to the claim without requesting information tending to prove it. RT at 259-60.

One example of the adversarial functioning of the VA adjudication of IR claims is the case of plaintiff Reason Warehime. At the time of trial, Warehime had been waiting eight years for resolution of his various IR claims. Ex. 454 [NAM003 0628-0632, NAM003 1000]. His claims had been remanded by the BVA to the VA's Northern California regional office on five separate occasions. The record of the adjudication of Warehime's IR claims contains an almost interminable string of lengthy delays, poor fact development and other forms of agency inaction and neglect which are both unjustified and clearly not in the claimant's interest. *See* Ex. 454.

In light of the above evidence, the court finds that the supposed informal and nonadversarial nature of the VA adjudication process for IR claims does not provide a significant safeguard for IR claimants.

C. Availability of Service Representatives

Volunteer service representatives are made available to IR claimants through various veterans organizations. In an ordinary case of impact injury or in other cases of a routine nature these representatives appear to do an adequate job. However, as explained below, these service representatives are unable to do a competent job for IR claimants or to provide adequate safeguards for them.

While service representatives undoubtedly are well-intentioned, their "crushing" caseloads make effective representation of claimants with complicated IR claims virtually impossible. Ex. 70. For example, the Disabled American Veterans employed ten appeals-level service representatives who handled 17,954 claims in Fiscal Year 1986; the two representatives of the AmVets presented 1304 claims to the BVA the same year. RT at 1780-82, Ex. 263.

Training of service representatives is very limited, and they receive no specialized training in the intricacies of IR claims. RT at 1174-75, 1177. As a result, service representatives often do not detect errors in VA denials of IR claims. RT at 1178-83.

In addition, the evidence shows that service representatives do little in the way of fact development for IR claims, instead relying almost exclusively on the claimant to marshal the complicated array of materials and information necessary to successfully present a claim. RT at 1107:23-1108:5, 1704:22-1707:2, 1712. For example, service representatives rarely obtain independent medical exams for claimants. RT at 1706. Worse yet, it appears that in most cases service representatives do not meet with the claimant before a rating decision is made. RT at 1708.

Service representatives rarely request a hearing for the claimant before the rating board and often discourage veterans from requesting a hearing prior to denial of the claim by the regional office. RT at 1150, 1730, Ex. 236. The record suggests that in those instances where a service representative does obtain a hearing for the claimant and represents the claimant, the representative often does not perform effectively as an advocate. RT at 1149-50, 1160-65, 1736. Frequently, the representative meets with the claimant for the first time one hour prior to the hearing. RT at 1149.

The evidence also indicates that service representatives are not an effective safeguard in appeals of claim denials before the BVA. Service representatives frequently fail to notify claimants of their right to appeal, and as a result, claimants

often fail to exhaust their administrative remedies. RT at 1714. Where the claimant is advised of his or her right to appeal, in most cases the claimant fills out the substantive appeal form without the assistance of the service representative. RT at 1159-60, 1724. This occurs despite the fact that the claimant is deemed to accept any factual finding in the Statement of the Case not disputed in the substantive appeal form. Service representatives rarely request hearings on behalf of the IR claimant before the BVA. RT at 1733. Appeals briefs prepared by service representatives are often inadequate. RT at 1158.

In sum, the evidence strongly suggests that there is little difference in quality between claims prepared solely by the IR claimant and those prepared with the assistance of a service representative. RT at 1169. The deleterious effects of the service representatives' almost total reliance on the claimant is magnified by the fact that the average veteran claimant has only an eleventh grade education. Ex. 461. Thus, service representatives do not provide any significant safeguard to the IR claimant.

IV. *Evidence Relevant to the Probable Value of Attorneys in Reducing the Risk of Erroneous Deprivation*

The record indicates that preparation of ionizing radiation claims involves a wide variety of tasks for which attorneys are trained and particularly well-suited. Attorneys frequently are trained and experienced in the use of FOIA, the Secrecy Act and the Privacy Act to obtain government documents. The record indicates that attorneys are very effective at obtaining records necessary to document an IR claim from the numerous government agencies involved. RT at 241:5-244:5. Such skills are essential for successful presentation of IR claims, given the frequent need to rely on government documents to, for example, analyze and critique DNA generic dose reconstructions.

Attorneys are frequently experienced in claim development and would be invaluable in insuring that claimants supply information requested by the VA in a timely manner, thus avoiding such possibilities as administrative denial for

failure to respond adequately to a pattern letter. RT at 169:14-171:1, 171:8-172:1, 173:22-175:1.

The record demonstrates that the complexity of the scientific and medical questions at issue in IR claims frequently makes expert testimony and opinion of great importance. Attorneys are skilled and experienced in working with experts in support of legal claims. In the case of IR claims, experts must examine military service records, military medical records and numerous other documents which must be obtained through FOIA requests. Attorneys can effectively facilitate collection of these documents for use by experts. RT at 640:1-641:16, 2330:19-2332:4, 2352:22-2353:10. Attorneys are also trained to be and are effective at framing the legally relevant issues for experts and at understanding the legal standards by which those issues will be judged. This training would contribute substantially to the work of medical and scientific experts in IR claims. RT at 640:1-641:16, 2353:11-18, 1425:19-2427:3.

Based on the evidence presented at trial, the court finds unequivocally that attorneys would perform far better than volunteer service representatives in other areas which are key to proper presentation of an IR claim. Attorneys would conduct more detailed and thorough factual development. RT at 1074:13-1087:18, 1094:6-1096:22, 1104:6-1106:8, 1107:12-22, 1110:20-1115:3, 1116:15-25. Attorneys would respond to VA requests for information, rather than leaving the lay-claimant to his or her own devices to respond to complex questions. RT at 1747:4-1748:12. Attorneys are more likely to detect and respond to procedural violations by the VA and to ensure that the claimant effectively takes advantage of procedural protections such as the right to a hearing. RT at 182:23-183:15, 250:22-253:15. Attorneys are better able to track down the relevant regulations, manual provisions and internal documents of the VA in order to muster support for their clients' IR claims and to interpret the myriad of complex regulations and rules relating to IR cases. Moreover, attorneys, because of their training, can more competently prepare briefs and appellate papers, conduct legal research, apply the law to the facts, and bring

legal challenges to mistaken agency interpretations of regulations and statutes. RT at 80:20-81:12, 131:22-132:2, 183:20-184:25, 1723:4-1726:19, 1170:1-1171:8, 1748:13-1751:17, 1152:23-1159:21, 1161:20-1164:22.

Finally, the evidence demonstrates that IR claimants who employ attorneys have had significantly higher success rates than those relying on service representatives. RT at 877:3-880:21, 980:12-982:15, 851:8-23, 984:16-987:11, 881:4-21, 957:16-958:10, Ex. B-22.

CONCLUSIONS OF LAW

I. *Due Process*

As discussed above, while the Supreme Court determined that the fee limitation challenged by plaintiffs was not unconstitutional on its face, it left open the possibility of a successful constitutional challenge by plaintiffs with complex claims different from the typical VA claim. *NARS II*, 473 U.S. at 337-38, 105 S.Ct. at 3197-98. The Court found that the record at the preliminary injunction stage did not identify a category of "complex cases" for which the process provided was insufficient. *Id.* at 329-330, 105 S.Ct. at 3193. The Court, however, recognized the possibility that the fee limitation might be found unconstitutional as it applied to "some discrete class of complex cases." *Id.* at 337, 105 S.Ct. at 3198.

Plaintiffs returned to this court and proceeded only on claims based on ionizing radiation as a cause for disability or death. The evidence discussed in the findings of fact amply demonstrates that, because of the extreme complexity of governing law, applicable procedures, medical and scientific issues, and necessary factual development, IR claims are exceptionally complex and are thus distinguishable from those of the typical VA benefits claimant.

The complexity of establishing causation of cancer and other diseases by toxic agents has been well-recognized in the context of toxic tort suits. *See, e.g.*, Mark S. Ellinger, *DNA Diagnostic Technology: Probing the Problem of Causation in Toxic Torts*, 3 *Harv.J.L. & Tech.* 31 (1990); Charles Nesson, *Agent*

Orange Meets the Blue Bus: Fact finding at the Frontier of Knowledge, 66 *B.U.L.Rev.* 521 (1986); Mary Carter Andrues, Note, *Proof of Cancer Causation in Toxic Waste Litigation: The Case of Determinacy Versus Indeterminacy*, 61 *S.Cal.L.Rev.* 2075 (1988); Note, *Developments in the Law: Toxic Waste Litigation*, 99 *Harv.L.Rev.* 1458, 1617-31 (1986); Steve Gold, Note, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 *Yale L.J.* 376 (1986); Orrin E. Tilevitz, Note, *Judicial Attitudes Towards Legal and Scientific Proof of Cancer Causation*, 3 *Colum.J.Envtl.L.* 344 (1977).

"The latency factor as well as the background incidence of [these diseases] ... engender a causal indeterminacy which hampers the ability to isolate the substance which induced the injury." *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 173-74 (W.D.Mo. 1988). In this opinion of over two hundred pages, one appellate court demonstrated the extraordinary difficulties in establishing causation where toxic agents and a myriad of symptoms are involved. Uncertainty and disagreements within the scientific community make it difficult even for persons trained in the law to present a cogent, persuasive case. *See Rubanick v. Witco Chemical Corp.*, 125 N.J. 421, 593 A.2d 733 (1991) (citing to a number of cases confronting the evidentiary and causation difficulties in toxic tort type cases). It is a daunting, if not impossible, task for a layperson or one without access to legal resources to compile evidence that is methodologically sound and will pass muster.

As can be seen in this court's findings above, the complexities and uncertainties in IR cases are even greater than most of the difficult toxic tort cases. Applying the *Mathews* test to the evidence in the record regarding IR claims, the court concludes as a matter of law both that the "private interest" at stake in IR claims is great and that the risk of erroneous deprivation of that interest is high. *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903.

The court further concludes that those features of the existing adjudication procedure which are intended to safeguard the interests of the IR claimant in fact do not serve that purpose. Specifically, the court concludes that the regulatory pre-

sumptions in favor of the client, the supposedly informal and non-adversarial nature of the VA adjudication procedure for IR claims, and the availability of service representatives from volunteer veterans organizations do not contribute in any significant way to ensuring that the legitimate interests of the claimant are protected and that IR claims are properly adjudicated.

In addition, the court concludes, based on the above findings of fact, that allowing IR claimants access to attorneys would be of great value as a procedural safeguard. Attorneys would provide extremely valuable and presently unavailable assistance to claimants in such key areas as factual development, marshalling of expert opinion on scientific and medical issues in dispute and effective utilization of statutorily guaranteed procedural rights. Volunteer service representatives are not effectively providing such assistance to claimants.

Having arrived at these conclusions of law, under the terms of *Mathews* the court must now examine the government interest in adhering to the challenged system. The Supreme Court, in reversing the preliminary injunction order, identified the government interest at stake as follows:

> that the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer.

NARS II, 473 U.S. at 321, 105 S.Ct. at 3189. The Court further stated that the government interest identified was reinforced by an absolute prohibition on compensation of any service organization representative. *Id.* at 321-22, 105 S.Ct. at 3189. Fearing that "destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible" and that the VA adjudication system would be "rendered more adversary and more complex by the very presence of lawyer representation," the Court ac-

corded great weight to the government interest. *Id.* at 326, 105 S.Ct. at 3191.

Regardless of the merit of the Court's analysis at the time, subsequent developments have robbed it of all validity.[10] In

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[10]Chief Justice Rehnquist's analysis implies that the real goal of the fee limitation was to prevent attorneys from participating in the adjudication of veterans' benefit claims, since only this would realize the government interest identified by the Court, i.e., preserving the "simple" nature of the procedures by keeping attorneys out. In fact, as Justice Stevens pointed out in his dissent in *NARS II*, the purpose of the fee limitation when enacted was not to prevent the employment of reputable counsel but instead to protect veterans from unscrupulous lawyers. *NARS II*, 473 U.S. at 360, 105 S.Ct. at 3210 (Stevens, J., dissenting). A $10 fee in 1862, the year the fee limitation was enacted, was roughly equivalent to a $580 fee today. *Id.* at 361, 105 S.Ct. at 3210. Thus, the fee limitation initially allowed for the employment of an attorney by a veteran claimant while the fee limitation at present does not.

Moreover, even prior to the passage of the Judicial Review Act of 1988, which definitively laid to rest the Chief Justice's government interest analysis, there were strong indications that the fee limitation, as written, no longer served a legitimate interest. In 1982 the Senate Committee on Veteran Affairs had the following to say about the fee limitation:

> [T]he basis for Congressional action, first after the Civil War and then after World War I, limiting the amount an attorney could receive for representing a claimant before the VA was grounded in the belief that the lawyers of that day were unscrupulous and were taking unfair advantage of veterans'. ... Whatever the merits of such a view at the time the limitation was imposed, ... it is the Committee's position that such a view of today's organized bar, particularly in light of the widespread network of local bar associations that now generally police attorney behavior, is no longer tenable.
>
> The Committee is also of the view that the current statutory limitation is an undue hindrance on the rights of veterans and other claimants to select representatives of their own choosing to represent them in VA matters ... [A]n individual should not be arbitrarily restricted in retaining an attorney, whether such representation is desired for reasons of personal preference or because of a concern that the claim is likely to be denied a second time by the Board of Veterans' Appeals and will be appealed to court. A claimant could well conclude, for example, that some

1988, Congress passed into law and the President signed the Veterans' Judicial Review Act of 1988 ("JRA"), P.L.100-687, 102 Stat. 4105, which partially repeals the challenged fee limitation and allows those veteran claimants who file a Notice of Disagreement with the Veterans Administration to retain an attorney for any proceedings following the Board of Veterans' Appeals initial final decision on a benefits claim. Consistent with the government's interest in protecting veterans from unscrupulous attorneys, the JRA requires BVA review and approval of the fee agreement between the claimant and retained counsel and limits contingency fees to twenty percent of the claimant's total benefit award. 38 U.S.C. § 5904(c)(2), (d)(1).

As enactment of the JRA makes clear, Congress and the President have determined that the challenged fee limitation is not in the national interest and that that interest instead requires allowing veteran claimants to utilize attorneys in VA proceedings after the BVA's initial final decision. Congress and the President have now clearly spoken on the nature of the government interest in these matters, and this court cannot and will not question this determination.

It is true that the JRA does not eliminate the fee limitation for claimants who filed their Notice of Disagreement prior to November 18, 1988, the date the law was enacted. Indeed, those claimants form the remainder of the class with active claims in this litigation. However, this court can conceive of no rational manner in which the government interest with regard to attorney participation in the VA adjudication process could be one thing for claimants who filed their NOD prior to November 18, 1988 and another for those who file after. Clearly, the adjudication process is the same for both groups of claimants, as is their need to be protected from unscrupulous attorneys.

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further development of the administrative record in a complex case would be of critical importance while the matter is still before the agency and that an attorney would be better able to so develop the record.

S.Rep. No. 97-466, 97th Cong., 2d Sess. at 50-51 (1982).

In addition, in December 1988 the VA adopted new regulations which state, in relevant part, that an attorney "may receive a fee or salary in excess of the statutory limit from an organization, governmental entity or other disinterested third party for representation of a claimant." 38 CFR § 14.634(a). The regulation exempts veterans' organizations and other interested groups from the $10 fee limit. Here again, the court cannot conceive of any rational government interest which would be served by effectively preventing individual claimants from retaining the assistance of counsel for adjudication of their VA claims when non-profit organizations may retain these same attorneys for the same purpose.

Finally, there is no evidence in the record and no reason to believe that the costs of administration of the IR claim adjudication system would increase because a claimant is represented by counsel as opposed to being represented by a volunteer service representative or appearing *pro se*. *NARS II*, 473 U.S. at 363, 105 S.Ct. at 3211 (Stevens, J., dissenting).

Therefore, this court concludes that the government has no significant interest in retaining the challenged fee limitation. Plaintiffs have made an extraordinarily strong showing of the probability of erroneous denial of ionizing radiation claims under the existing system, and an equally strong showing that assistance of counsel will sharply reduce that possibility. Given the absence of any countervailing government interest, the court concludes that, as a matter of law, the $10 fee limitation violates the due process rights of ionizing radiation claimants and is thus unconstitutional.[11]

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[11]The case at bar is easily distinguishable from the Supreme Court's recent decision in *United States Department of Labor v. Triplett*, 494 U.S. 715, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990). That case involved a due process challenge to a statute which allows for payment of a "reasonable attorney's fee" to an attorney who successfully represents a black lung claimant but requires that the fee be approved by the appropriate government agency. *Triplett*, 110 S.Ct. at 1430. The $10 fee limitation at issue here, of course, does not provide for a reasonable attorney's fee for the attorneys of IR claimants. Moreover, in *Triplett* the Court ruled that the challenged statute did not

II. *First Amendment*

Plaintiffs maintain that the fee limitation violates the First Amendment by denying them the right to petition the government for redress, which includes the right to meaningful access to adjudication.[12]

In reversing the preliminary injunction order in this case, the Supreme Court expressed reservations regarding some elements of this court's First Amendment analysis. *See NARS II*, 473 U.S. at 334-35, 105 S.Ct. at 3196. For example, the Court noted perceived "conceptual difficulties" in applying *United Mine Workers*, 389 U.S. 217, 88 S.Ct. 353 and *Brotherhood of Railroad Trainmen*, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89, which were cited in the preliminary injunction order, to the case at bar. *NARS II*, 473 U.S. at 334, 105 S.Ct. at 3196. The Court also labelled as a "questionable proposition" the notion that IR claimants have a First Amendment right to retain a "surrogate speaker" to speak for them in VA adjudication proceedings. *Id.* at 335, 105 S.Ct. at 3196. Ultimately, however, the Court deemed plaintiffs' First Amendment argument unpersuasive because, on the record at the preliminary injunction stage, the Court found that plaintiffs had an opportunity to make a meaningful presentation under the existing VA claims process.

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violate due process because the record did not establish that, as a result of the fee restriction, attorneys were unavailable to black lung claimants. *Triplett*, 110 S.Ct. at 1433-35. In contrast, in the case at bar both the record and common sense lead to the inexorable conclusion that the $10 fee limitation make attorneys unavailable to ionizing radiation claimants. Indeed, the Supreme Court assumed this to be the case even based on the limited record before it at the preliminary injunction stage. *Triplett*, 110 S.Ct. at 1433.

[12]Plaintiffs also argued that the fee limitation violated the right of plaintiff NARS to offer its members competent legal representation. With the enactment of 38 CFR § 14.634(a), which exempts voluntary organizations such as NARS from the fee limitation, this claim is now moot.

While the record before the Supreme Court at the preliminary injunction stage was limited, it is now fully developed. As the above findings of fact and conclusions of law with regard to plaintiffs' due process claim make clear, this court has now determined that the system challenged by plaintiffs does not afford IR claimants a meaningful opportunity to present their claim to the government in light of the intricacies of the governing law and adjudication process at issue, the substantive complexities of ionizing radiation claims, and the illusory nature of existing safeguards to claimants' interests. The court, therefore, must determine whether this infringes on plaintiffs' First Amendment rights.

Application of the union cases and *Button* in the instant litigation may well present some "conceptual difficulties" because those cases involve the right of organizations to seek legal representation for constituents, while the right of the individuals themselves to legal representation is at issue in the instant case. On closer examination, however, this distinction alone is not dispositive. As the Supreme Court has made clear,

> [u]nderlying [these cases] was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them. *This concern applies with at least as much force to aggrieved individuals as it does to groups.*

Bates v. State Bar of Arizona, 433 U.S. 350, 376 n. 32, 97 S.Ct. 2691, 2705 n. 32, 53 L.Ed.2d 810, *reh'g denied*, 434 U.S. 881, 98 S.Ct. 242, 54 L.Ed.2d 164 (1977) (emphasis added). Lower courts have not limited application of *Button* and the union cases to situations involving organizational legal action. See *Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir.1985) (invoking *Button* in support of proposition that actions of a prisoner who assisted fellow prisoners in preparing habeas petitions were protected by the First Amendment); *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir.1990) *cert. denied, Welsh v. DeLoach*, — U.S.—, 112 S.Ct. 65, 116 L.Ed.2d 41 (1991) (citing *Button* and *United Mine Workers* to support ruling in section 1983 action that retaliation for plaintiff's decision to retain counsel when a suspect in a criminal prosecution could constitute a violation of plain-

tiff's First Amendment right of association and free speech); *Owens v. Rush*, 654 F.2d 1370, 1379 (10th Cir.1981) (citing *Button* to support ruling that husband's activities, assisting spouse in preparation of Title VII law suit, were protected by the First Amendment). This court thus concludes that the First Amendment guarantees an individual meaningful access to the adjudicatory process and protects efforts to obtain legal representation to effectuate this access.

The weight of plaintiffs' First Amendment interests is not diminished because ionizing radiation claimants seek meaningful access to the adjudication procedures of an administrative agency. As the Supreme Court observed in *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972), the First Amendment protects the right to petition an administrative agency:

> [t]he same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government ... the right of access to the courts is indeed but one aspect of the right to petition.

The fact that plaintiffs in this case seek economic compensation from the VA for the health repercussions of exposure to ionizing radiation, rather than seeking only to make a political statement through their actions, does not deny plaintiffs First Amendment protection. *See, eg., United Mine Workers*, 389 U.S. at 221-22, 88 S.Ct. at 355-56 (First Amendment gives union right to hire attorney to assist members in processing of workers' compensation claims). Moreover, as the tremendous public interest generated by this case and the flurry of legislative activity with regard to "atomic veterans" demonstrates, the ionizing radiation claims at issue here implicate important political values. Indeed, ionizing radiation claimants have found themselves at the center of a political controversy concerning the safety of nuclear testing and weapons and the government's responsibility to provide for veterans allegedly exposed to radiation during military service.

It is also now beyond question that the First Amendment protects plaintiffs' right to pay another to assist them in effectuating their right to petition. In *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988), the Supreme Court struck down a Colorado statute prohibiting payment of initiative petition circulators, holding that the statute infringed on appellees' First Amendment right to petition the government and was not narrowly tailored to achieve the government's stated goal. The *Meyer* Court also rejected the argument that appellees had other effective means to disseminate their ideas, observing that "[t]he First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer*, 486 U.S. at 424, 108 S.Ct. at 1893.

If anything, plaintiffs' position is more compelling than that of appellees in *Meyer*. As this court's findings of fact demonstrate, retaining counsel is often plaintiffs *only* means of effectively pursuing their ionizing radiation claims. In such a context, there can be no doubt that plaintiffs' First Amendment right encompasses the right to pay an attorney for legal assistance and the $10 fee limitation trammels plaintiffs' First Amendment interests.

Restrictions on First Amendment interests pass constitutional muster only when they are narrowly tailored to serve a legitimate state interest. *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 789, 108 S.Ct. 2667, 2673, 101 L.Ed.2d 669 (1988). As discussed above, the Veterans' Judicial Review Act, removes the $10 fee limitation for many ionizing radiation claimants. As a result, the government can hardly maintain that it has a continued interest in preserving the supposed "informal" and "non-adversarial" nature of the VA adjudication process by effectively denying attorneys to those not covered by the terms of the JRA. Even assuming *arguendo* that the state could legitimately retain an interest in protecting those IR claimants not affected by the JRA from unscrupulous lawyers, this "paternalistic" government interest could not counterbalance the plaintiffs' First Amendment rights. In *Riley*, the state of North Carolina attempted to de-

fend statutory limits on the fees of professional solicitors of charitable contributions with "the paternalistic premise that charities' speech must be regulated for their own benefit." 487 U.S. at 790, 108 S.Ct. at 2674. Finding this purported government interest to be unsound, the Court noted:

> [t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it. ... To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners ...

Id., 487 U.S. at 790-91, 108 S.Ct. at 2674 (citations omitted).

Moreover, even if there were legitimate government interests at stake in this case, the fee limitation is not narrowly tailored to serve them. For example, the state's paternalistic interest in protecting IR claimants from unscrupulous attorneys would be equally served by the type of "reasonable fee" provision contained in the JRA, while at the same time allowing IR claimants the opportunity to obtain legal representation. In addition, the government might temper the formality and adversarial nature of the IR claim adjudication process by, for example, limiting the number of hearings, the length of written submissions, and the time for argument. *See NARS II*, 473 U.S. at 363, 105 S.Ct. at 3211 (Stevens, J., dissenting).

For the foregoing reasons, the court concludes that the $10 fee limitation violates plaintiffs' First Amendment right to free speech and to petition the government.

CONCLUSION

In light of the above findings of fact and conclusions of law, the court rules that the $10 fee limitation violates plaintiffs' constitutional rights under both the Fifth and First Amendments.

IT IS SO ORDERED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, et al.	)	No. 92-15988
Plaintiffs-Appellees,	)	D.C. No. CV-83-01861-MHP
v.	)	ORDER
EDWARD J. DERWINSKI, Secretary of the Department of Veterans Affairs, et al.,	)	
Defendants-Appellants.	)	

Filed: June 18;, 1993

Before: CHOY, ALARCON and HALL, Circuit Judges.

The opinion filed November 24, 1992, slip op. 13643, is amended as follows:

> Delete footnote 3 on slip opinion page 13648 and renumber the remaining footnotes accordingly; also, delete the last sentence of he first paragraph on slip opinion page 13652 and footnote 7; and further, insert "to" between "right" and "free speech" on slip opinion page 13647, first paragraph, second to last line.

With these amendments, the panel has voted to deny both Appellee's and Class Plaintiffs-Appellees's petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the amendments set forth above, and of the suggestions for rehearing en banc and

no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

38 U.S.C. § 3404. Recognition of agents and attorneys generally (prospectively repealed 1988)

(a) The Administrator may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration. The Administrator may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.

(b) The Administrator, after notice and opportunity for a hearing, may suspend or exclude from further practice before the Veterans' Administration any agent or attorney recognized under this section if he finds that such agent or attorney—

(1) has engaged in any unlawful, unprofessional, or dishonest practice;

(2) has been guilty of disreputable conduct;

(3) is incompetent;

(4) has violated or refused to comply with any of the laws administered by the Veterans' Administration, or with any of the regulations or instructions governing practice before the Veterans' Administration; or

(5) has in any manner deceived, misled, or threatened any actual or prospective claimant.

(c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—

(1) shall be determined and paid as prescribed by the Administrator;

(2) shall not exceed $10 with respect to any one claim; and,

(3) shall be deducted from monetary benefits claimed and allowed.

38 U.S.C. § 3405. Penalty for certain acts (prospectively repealed 1988)

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both.